

REPORT
OF THE
ATTORNEY GENERAL
OF THE
STATE OF MICHIGAN

FOR THE
YEAR ENDING JUNE 30, A. D. 1895

FRED A. MAYNARD
ATTORNEY GENERAL



BY AUTHORITY

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REPORT.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, July 1, 1895.

To the Legislature of the State of Michigan:

The law of the State of Michigan requires that the Attorney General shall make an annual report. In compliance therewith I have the honor to submit herewith such annual report for the year commencing July 1, 1894, and ending June 30, 1895.

The first half of the year, from July 1, 1894, to January 1, 1895, the Hon. Adolphus A. Ellis was Attorney General; and all the various matters arising and disposed of by him during that time, together with opinions issued by him, are made a part of this report.

¶ The several matters embraced in the report are particularly referred to in the schedules hereto attached and numbered A to I inclusive.

The several schedules embraced in the report contain a full statement of all criminal cases brought to the supreme court by *writ of error* or otherwise, together with a statement of facts in connection with each case, and the opinion of the supreme court in full, including notes in reference thereto.

All *mandamus*, *quo warranto*, and all other proceedings instituted by the Attorney General in behalf of the State, or commenced by other parties, in which the State is directly interested, are herein given together with a statement of the points raised, and the decision of the court thereon.

All *chancery* cases commenced or completed during the year, or now pending, are given; and in cases where decisions have been rendered, a statement of the points raised is given with the decision of the court thereon.

A full list of *quo warranto* and other special proceedings authorized by the Attorney General, but at the expense of other parties, is given, and where decisions have been rendered by the court, they are set forth.

All *chancery* cases commenced in the different circuit courts in chancery, in this State, in which the State is interested, which have been referred to the Attorney General, and, as required by law, referred by this department to the prosecuting attorneys of the various counties, being, as a rule, cases relative to tax matters, are given herein as full as possible.

The schedule containing an abstract of the reports of the various prosecuting attorneys for the year ending June 30, 1895, showing the number of prosecutions in the State for each particular offense during the fiscal year, shows that the whole number prosecuted during the past year has been 23,106. A separate schedule has been made setting forth the name of each prosecuting attorney and his postoffice address, together with the number of prosecutions and the results thereof brought by him, which has been carefully prepared, and will be very convenient for reference.

The Attorney General is required by law to examine and approve of all mutual insurance companies which incorporate or are organized, or amend their articles of association. During the year fifteen companies have either organized or submitted amendments to the Attorney General for his approval. A list of such companies will be found in the proper schedule.

The number of official opinions given during the year is 66, of which Hon. Adolphus A. Ellis rendered 37, and the present Attorney General, up to the date of this report, 29. In addition to this about 3,000 letters have been received and answered by the department.

The work in the Attorney General's office is constantly increasing, and each legislature creates new and responsible business for the Attorney General. The various duties of the Attorney General are in part as follows:

1. The prosecution and defense in behalf of the State of all actions in the supreme court.

2. To appear for the State in any other courts, when directed by the Governor and legislature.

3. To prosecute and defend suits on request of State officers.

4. To consult with and advise prosecuting attorneys.

5. To give opinions to the legislature and the members thereof.

6. Adviser to and represents the State before the Board of State Auditors.

7. To bring proceedings for the removal of certain public officials from office.

8. To bring action against railroad companies for neglect to pay their taxes.

9. To bring proceedings to collect penalties for violations of provisions of the law relating to brokers and exchange dealers.

10. To prosecute suits for the violation of railroad laws.

11. To examine and approve articles of association of life insurance companies, and bring proceedings against them for forfeiture, etc.

12. To examine and approve articles of association of mutual fire insurance companies, and bring proceedings for forfeitures, etc.

13. To examine and approve articles of association of fire and marine insurance companies.

14. To approve articles of association of millers' insurance companies.

15. To approve articles of association of plate glass insurance companies.

16. To bring proceedings for the penalty of using unauthorized form of fire insurance policy.

17. He is acting member of the Insurance Policy Commission.

18. To bring proceedings to condemn lands for the use of the State.

19. Is a member of the Board of Auditors of claims growing out of the sale of public lands.

20. A member of the Agricultural Land Grant Board.
21. A member of the Board of Control for Reclamation of Swamp Land.
22. Prosecutes all criminal cases in the supreme court.
23. Brings proceedings for the penalty against foreign life insurance companies.
24. To approve bonds of the Secretary of State, Deputy Secretary of State, executive clerk and private secretary to the Governor.
25. To institute proceedings against corporations for collection of penalty for not filing annual report.
26. To bring proceedings against foreign building and loan associations for any illegal practice.
27. He is expected to give counsel and advice to the insurance department, the banking department, the labor bureau, the railroad department, and all the other State departments, besides the State House of Correction and Reformatory at Ionia, State House of Correction and Branch of State Prison in the Upper Peninsula, at Marquette; State Prison, at Jackson; Michigan Asylum for Dangerous and Criminal Insane, at Ionia; Upper Peninsula Asylum for the Insane, at Newberry; Northern Michigan Asylum, at Traverse City; Michigan Asylum for Insane, Kalamazoo; Michigan Home for the Feeble Minded and Epileptic, Lapeer; Detroit House of Correction; Industrial School for Boys, Lansing; Industrial Home for Girls, Adrian; State Public School, Coldwater; Soldiers' Home, Grand Rapids; Michigan School for the Deaf, Flint; Michigan School for the Blind, at Lansing, and the State Normal School at Ypsilanti; the State Board of Health, the State Board of Corrections and Charities, State Board of Fish Commission, State Live Stock Sanitary Commission; also all State boards of control of the various State institutions. All of which makes the work of the Attorney General not only laborious, but exceedingly responsible.

The population of the State of Michigan is constantly increasing, and the number of corporations organized each year is growing larger, property rapidly accumulating and increasing in value; and Michigan today is a State of great wealth and her varied and elaborate institutions rank among the best in the union. Consequently the litigation to be looked after and managed by the Attorney General involves questions of great importance to the State, with important principles involved, and oftentimes thousands and thousands of dollars, requiring of the Attorney General his best attention, ability and caution; as a blunder, in many instances, upon his part, would mean the loss of enormous amounts of money to the State.

The Attorney General receives daily a very large number of requests from county, city, town and village officers for legal instruction on questions which arise in the performance of their respective duties; also a great many requests are made by private persons and corporations for opinions upon purely personal matters.

To comply with all these requests would seriously interfere with and retard the dispatch of the State's business. I have undertaken, however, as a matter of courtesy, to answer all letters, even if not at liberty to grant the requests. I have endeavored to comply with every request for advice upon questions of general interest to the people of the State, and the interpretation of statutes of a public nature.

I desire to express my thanks to the honorable house of representatives of the legislature of 1895 for their kind appreciation of my efforts to assist them in their laborious duties, and for their expression of the same by the following:

WHEREAS, The members of this house on Tuesday, the 15th day of January, 1895, received from Honorable Fred A. Maynard, Attorney General of the State of Michigan, the following communication:

ATTORNEY GENERAL'S OFFICE, }
Lansing, Mich., January 15, 1895. }

To the House of Representatives:

GENTLEMEN—I beg leave to say that I expect to be in my office in the capitol during every day the legislature is in session; and I take this opportunity of saying to each and every member of your honorable body, that I shall regard it as a privilege to render you any assistance in my power, in the preparation or correction of bills, or to assist in any other way that I may be able.

Respectfully yours,

FRED A. MAYNARD,
Attorney General.

AND WHEREAS, *The Attorney General, except when absent for a few days on official business, has so been in his office, and has rendered to very many members of this house the greatest assistance in the preparation and correction of bills offered by them; and has, in many other ways, aided and assisted in the discharge of our official duties, and has been ready at all times to aid and assist us in our work; and*

WHEREAS, *All of this work has been in addition to the great and important duties which devolve upon the Attorney General of this State, and which he has so ably and conscientiously performed; therefore be it*

Resolved by this house, That by reason of such aid and assistance so willingly and cheerfully given us, the Honorable Fred A. Maynard, Attorney General of this State, has merited the thanks of this House; and we do hereby tender to him our sincere thanks for the great service that he has rendered;

Resolved further, That the Clerk present to the Attorney General an appropriately engrossed copy of these resolutions;

Which was adopted.

Respectfully submitted,

FRED A. MAYNARD,
Attorney General.

SCHEDULE A.

Schedule A contains a full statement of all *criminal cases* brought to the Supreme Court on *exception, writ of error, certiorari* and *habeas corpus*, whether disposed of or pending, in which the Attorney General has appeared, or which are of general interest to those entrusted with the administration of the criminal laws of the State.

THE PEOPLE v. ARTHUR MACHEN.

Criminal law—Larceny—Excluding witness from court room—Evidence—Res gestæ—Indorsing witnesses on information—Instruction to jury.

1. Respondent was informed against for attempting to commit the crime of larceny from the person. On the trial his counsel requested that one of the two officers who made the arrest should be excluded from the court room while the other was testifying. And it is held that it was not error to refuse to grant the request, it being a matter entirely within the discretion of the court; citing *People v. Burns*, 67 Mich., 537.
2. Evidence that, just prior to his arrest, the respondent was seen with a newspaper in one hand, while his other hand was among the ladies' dresses, feeling of their pockets, and that the witness notified one of the officers of respondent's movements, which information caused them to watch him, was competent as a part of the *res gestæ*, tending to show intent.
3. During the trial the prosecuting attorney was permitted to indorse the name of a witness upon the information, after testifying that he had just learned that he was a material witness. And it is held that in this there was no error.¹
4. Evidence that a "billy" was found upon the person of the respondent, at the time of his arrest, was admissible.
5. No testimony was offered on the part of the respondent. The jury were fully and fairly instructed upon the questions of reasonable doubt, and the presumption of innocence, and as to all the elements necessary to be proved in order to convict. In the course of the charge the circuit judge said: "You have heard the testimony for the prosecution. That is all there is to this case—the testimony for the prosecution." And it is held that this language, when considered with the entire charge, cannot be construed, as counsel insists, into even an intimation on the part of the judge that the people had established their case.

Indorsing Names of Witnesses on Information.

For cases bearing upon the proper construction of and practice under How. Stat., Sec. 9549, which provides that the prosecuting attorney shall indorse on all informations the names of the witnesses known to him at the time of filing the same; and, at such time before the trial of any case as the court may, by rule or otherwise, prescribe, he shall also indorse thereon the names of such other witnesses as shall then be known to him. See

General Rules Applicable to the Subject.

1. *Hill v. People*, 26 Mich., 496, holding that the second requirement of the statute, for the indorsement of the names of witnesses before the trial, does not, by its terms, nor by any reasonable implica-

Error to recorder's court of Detroit. (Chambers, J.) Submitted on briefs June 28, 1894. Decided July 5, 1894.

Respondent was convicted of attempting to commit the crime of larceny from the person, and sentenced to imprisonment in the State Prison for 28 months. Judgment affirmed. The facts are stated in the opinion.

Harlow P. Davock, for respondent.

A. A. Ellis, Attorney General, and *Allan H. Frazer*, prosecuting attorney, for the people.

GRANT, J. Respondent was convicted of an attempt to commit larceny from the person. Two officers testified that their attention had been called to his actions, that they watched him, and arrested him with his hand in a lady's pocket.

1. Respondent's counsel requested that one officer be excluded while the other was testifying, which request was refused. This point is ruled by *People v. Burns*, 67 Mich. 537, 35 N. W. 154. The refusal was not error.

2. One Orth, just previous to the arrest, had seen respondent with a newspaper in one hand and his other hand among the ladies' dresses, feeling their pockets, and notified one of the officers of his movements. This information caused the officers to watch him. Error is alleged upon the admission of this evidence. It was competent as a part of the *res gesta* tending to show the intent.

3. During the trial the prosecuting attorney was permitted to indorse the name of a witness upon the information after testifying that he had just learned that he was a material witness. In this there was no error.

tion, extend to any witnesses not known to the prosecuting attorney previous to the commencement of the trial, but involves a clear implication that it was not intended to apply to witnesses first discovered by him to be material after the commencement of the trial.

2. *People v. Quick*, 58 Mich., 321, holding that the respondent has the right to know, in advance of the trial, what witnesses are to be produced against him, so far as then known, and to have the names of any new witnesses indorsed on the information as soon as discovered; that the object of this is not merely to advise him what witnesses will be produced on the main charge, but to guard him against the production of persons who are unknown, and whose character he should have an opportunity to canvass; and that it is as important to impeach a rebutting witness as any other.

3. *The People v. Price*, 74 Mich., 37, holding that, as to such witnesses as are known to the prosecuting attorney at the time of filing the information, the statute is imperative that he shall indorse their names at the time of such filing; and his failure to do so is not excused by a want of knowledge of their whereabouts, or that their attendance can be secured.

4. *People v. Howes*, 81 Mich., 396, holding that the right of a respondent to have the names of witnesses known to the prosecuting attorney indorsed on the information before the trial is a substantial one, which courts cannot ignore; nor will the carelessness or neglect of the prosecuting officer warrant the court in permitting such indorsement on the trial.

Waiver.

1. *People v. Howes*, 81 Mich., 396, holding that where, after the commencement of the trial, the prosecuting attorney stated to the court that he had just learned of two material witnesses whose names were not indorsed on the information, and the respondent's counsel thereupon waived any further showing, the indorsement of such names was not error.

2. *People v. Harris*, 95 Mich., 87, holding that an objection to the testimony of a witness because his name is not indorsed on the information comes too late after the witness has been sworn and examined at length.

Illustrative Cases.

1. *Hill v. People*, 26 Mich., 498, where, after several witnesses had testified on the part of the people in a burglary case, and before the prosecution had rested, the prosecuting attorney called as a witness one whose name was not indorsed on the information, and upon it being satisfactorily shown to the court that the prosecuting attorney was not apprised that such person was a material witness before the trial commenced, nor until the time he was thus called, the court permitted his name to be then indorsed on the information, and he testified to admissions made to him by the respondent tending to prove his guilt. And it is held that the ruling of the court was clearly correct.

2. *Weller v. People*, 30 Mich., 16, 23, where, on the trial of a respondent for murder, the defense was compelled to call one of the two eye-witnesses of the homicide as a witness, although his name was indorsed

4. There was no error in admitting evidence that a billy was found upon the person of the respondent at the time of his arrest.

5. Complaint is made that the judge, in charging the jury, said: "You have heard the testimony for the prosecution. That is all there is to this case—the testimony for the prosecution." No testimony was offered on the part of the respondent. The judge fully and fairly instructed the jury upon the presumptions of innocence, reasonable doubt, and all the elements necessary to be proven in order to convict. This language, when considered with the entire charge, cannot be construed, as counsel insist, into even an intimation on the part of the judge that the people had established their case. The case was fairly submitted to the jury.

We find no error, and the judgment is affirmed. The other justices concurred. (101 Mich. Rep., 400.)

THE PEOPLE v. WILLIAM D. C. GERMAINE.

Criminal law—Evidence—Respective witness—Duty of People to call.

1. Where, in a prosecution for assault with intent to commit the crime of murder, the complaining witness testifies that, at the time the shot which inflicted the injury complained of was fired, but one person aside from the respondent and himself was in the room where the shooting occurred, and that he (the witness) did not see the shot fired, and the evidence as to who fired it is purely circumstantial, it is the duty of the prosecuting attorney to call and examine said third party as a witness.¹

on the information as one of the people's witnesses. And it was held that the fact that the name of a witness is indorsed on the information does not of itself involve any necessary obligation to do more than have him in court ready to be examined; but in cases of homicide, and in other cases where analogous reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called, unless, possibly, where too numerous.

3. *People v. Hall*, 48 Mich., 482, 487, where the respondent was informed against for murder, and on the trial the court allowed the names of several witnesses to be added to the information, under objection without any showing that they were not known earlier, and in time to give respondent notice in season to anticipate their presence before trial. And it was held that the statute is explicit that this shall be done before trial where witnesses are known; that this is not a mere formality, and wherever it has been provided for by statute it has been treated as a substantial right.

4. *People v. Moran*, 48 Mich., 539, where, on filing an information for burglary, the prosecuting attorney indorsed thereon the names of certain witnesses, and when the case came on for trial, and before the trial was entered upon or jury called, he indorsed the names of a number of other witnesses without any application to or permission from the court. And it was held that the case was ruled by *People v. Hall*, 48 Mich., 482, and a new trial was directed.

5. *People v. Perriman*, 72 Mich., 181, 187, where the respondent was convicted of bigamy, and assigned as error that the prosecuting attorney added the names of two witnesses to those already indorsed on the information, by leave granted in court before trial, without any sufficient showing that they were not known to him before. And it was held that it might be answered that no application was made for a continuance on that ground, but that it further appeared that the added witnesses lived in another state, and were beyond the reach of process from this State, so that a knowledge of their materiality would not have insured their attendance; that, while fairness requires that no needless delay should occur in placing on the information the names of known witnesses, yet it cannot be made an absolute requirement in cases of such a nature as the present, where the prosecution cannot compel attendance.

6. *People v. Evans*, 72 Mich., 367, holding that the court may properly permit the prosecuting attorney to indorse the name of the complaining witness, whose testimony was taken on the preliminary examination, upon the information, after the jury is sworn, he having failed to make such indorsement through inadvertence; but if the respondent makes a reasonable claim that he is not prepared to meet the testimony expected to be given by said witness, he should be allowed a reasonable time to prepare his defense.

7. *People v. Price*, 74 Mich., 37, where the names of witnesses known to the prosecuting attorney at the time of filing the information were allowed to be indorsed after the jury and a witness had been sworn. And it was held that the refusal of the court to grant the respondent a continuance on his application was error, for which the conviction should be reversed, and a new trial ordered.

8. *People v. Miller*, 94 Mich., 530, holding that where a police officer has been present since the commencement of a criminal trial, seated at a table with the prosecuting officers, and his name has been frequently mentioned in the testimony, and it is clearly apparent to the court that the failure to indorse his name on the information was an oversight, it is not error for the court to permit such indorsement to be made after he is called and sworn as a witness, and his examination to proceed.

¹ For cases bearing upon the question of the duty of the people to introduce in criminal cases the testimony of *res gestæ* witnesses, see note at the end of the opinion herein; and as to the indorsing of witnesses on information, see *People v. Machen*, ante, 401, and note.

2. The non-performance of this duty is not excused by the fact that said third party is a sister of the respondent, it also appearing that she was at the time of the assault the fiancé of the complaining witness.

Exceptions before judgment from Grand Traverse. (Corbett, J.)
Argued April 26, 1894. Decided September 25, 1894.

Respondent was convicted of an assault with intent to commit the crime of murder. Conviction set aside, and new trial ordered. The facts are stated in the opinion and in the foot-notes.

Pratt & Davis, for respondent.

A. A. Ellis, Attorney General, and *W. H. Foster*, prosecuting attorney, for the people.

MCGRATH, C. J.—Respondent was charged with an assault upon one Ramsdell, with intent to commit the crime of murder. Ramsdell did not see the first shot fired, and the evidence as to who fired that shot was purely circumstantial.¹

The rule that the prosecution cannot properly claim a conviction upon evidence which expressly or by implication shows but a part of the *res gestæ* or whole transaction, if it appears that the evidence of the rest of the transaction is attainable, and that all the witnesses present at the transaction should be called for the prosecution, unless it appears that the testimony of those not called would be merely cumulative, should certainly be applied in a case like the present. The court instructed the jury that their verdict—"Must be either that the defendant is guilty of assault with intent to commit the crime of murder, or that the defendant is guilty of committing an assault and battery, or an acquittal."

All that occurred prior to the shooting was material, as determining the questions submitted, and the character of the act. The only witnesses called respecting these occurrences was the assaulted party. *Maher v. People*, 10 Mich., 212; *Hurd v. People*, 25 Id. 415; *Weller v. People*, 30 Id. 16; *Thomas v. People*, 39 Id. 309; *People v. Davis*, 52 Id. 569; *People v. Swetland*, 77 Id. 53; *People v. Deitz*, 86 Id. 419.

The duty of prosecuting attorney is not discharged with the mere production of the witness.² As is said in *People v. Swetland*: "It is the

¹ Ramsdell testified that on the day of shooting he was eating supper at the house of respondent's mother; that respondent ordered him to leave the house; that he at first declined to go, but finally went into the sitting room, where he was followed by respondent and his sister; that the three were the only occupants of the sitting room; that witness passed into the parlor, and, just as he was opening the door leading to the street, he received a bullet wound in his shoulder; that respondent's sister went with the witness almost to the door, and then ran back, and witness saw her take hold of her brother, and that this occurred about the time the shot was fired.

² At the conclusion of Ramsdell's testimony one of the attorneys for respondent stated to the court that he should insist on the prosecution producing the sister of respondent as a witness before closing their case. The sister was produced and sworn, and the prosecuting attorney declined to examine her as a witness for the people, but stated that respondent was at liberty to examine her, which action was sustained by the court. The respondent's attorney declined to examine the witness, put in no defense, and declined to argue the case to the jury.

RES GESTÆ WITNESSES IN CRIMINAL CASES.

For cases bearing upon the question of the duty of the prosecuting attorney to produce the testimony of *res gestæ* witnesses in criminal cases, see:

Homicide.

1. *Hurd v. People*, 25 Mich., 405, 415, where the prosecution failed to call as a witness a party who was present at the assault which led up to the murder, and took part at that time in stopping the affray. He was afterwards sworn in behalf of the respondent, and it appeared that he heard the conversation leading

duty of the prosecuting attorney to furnish all the evidence within his power bearing upon the issue of guilt or innocence, in relation to the main issue, or to give some good excuse for not doing so."

In *Thomas v. People*, 39 Mich., 309, a saloonist fired a pistol through his door in trying to keep a disorderly crowd out. He was charged with an assault with intent to murder. His son and another man were the only other persons in the saloon when the shot was fired. The stranger had been subpoenaed and called, but did not respond. This court said:

"No effort then seems to have been made to produce him, and no impediment to doing so is shown. The prosecution now attempt an excuse for

not to such assault at an earlier stage than a witness who testified for the people regarding the same, and no relationship or complicity with the respondent was shown or pretended. And it was held:

a.—That the prosecution can never, in a criminal case, properly claim a conviction upon evidence which, expressly or impliedly, shows but a part of the *res geste* or whole transaction, if it appears that the remainder is attainable; that this would be to deprive the respondent of the benefit of the presumption of innocence and to throw upon him the burden of proving his innocence; that it is the *res geste* or the whole transaction the burden of proving which rests upon the prosecution, so far at least as the evidence is attainable; that it is that which constitutes the people's case, and as to which the respondent has the right of cross-examination.

b.—That the English rule goes so far as to require the prosecutor to produce all present at the transaction, though they may be near relatives of the prisoner, but doubtless, where the number present has been very great, the production of a part of them might be dispensed with after so many had been sworn as to lead the inference that the rest would be merely cumulative, and where there is no ground to suspect an intent to conceal a part of the transaction; that whether the rule should be enforced in all cases where those not called are near relatives of the prisoner, or where some other special cause for not calling them exists, need not be here determined, but certainly if the facts stated by those who are called show *prima facie* or even probable reason for believing that there are other parts of the transaction to which they have not testified, and which are likely to be shown by other witnesses present at the transaction, such other witnesses should be called by the prosecution, if attainable, however nearly related to the prisoner.

2. *Wellar v. People*, 30 Mich., 16, 22, where the name of one of two persons present at the occurrence was indorsed on the information, but the defense was compelled to call him as a witness instead of the prosecution. And it was held that the fact that the name of a witness is indorsed on the information does not of itself involve any necessary obligation to do any more than have the witness in court ready to be examined; but in cases of homicide, and in others where analogous reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called, unless, possibly, where too numerous.

3. *People v. Coffman*, 59 Mich., 1, holding that where the homicide charged is shown by two nimb-patched eye-witnesses, and is not denied by the respondent, who defends on the ground of drunkenness, he cannot complain for want of more evidence of the *res geste*, it appearing that others witnessed the killing.

4. *People v. McCullough*, 81 Mich., 25, where three respondents were jointly informed against for manslaughter, and demanded separate trials. The theory of the prosecution was that the deceased came to his death by being hit by a stone thrown by one of the respondents. No concert of action was shown between them, and, at the time the stone was thrown, the other two were some distance from the one who threw it, and were nearer to the deceased, and, according to the testimony of some of the witnesses, had their hands raised, but the witnesses did not testify that they struck the deceased. The testimony failed to show any marks or bruises upon the person of the deceased. And it was held that it was the duty of the prosecution either to put the two respondents on trial first, or to tender them as witnesses for the people on the trial of the third respondent, and thus enable him to cross-examine them, if he so desired.

5. *People v. Harris*, 95 Mich., 87, holding that where the names of the father and mother of the respondent are indorsed on the information, and the mother, who claims to have witnessed the entire affray, is called and testifies on behalf of the people, the rights of the respondent are fully protected by the prosecution calling the father, who had not witnessed the beginning of the affray, and having him sworn, and by his examination by the counsel for the respondent.

Assault with Intent to Murder.

Thomas v. People, 39 Mich., 309, 312, where the assault was committed by the shooting of one who was attempting with others to enter respondent's saloon. It appeared that respondent, his son and a stranger were alone in the saloon at the time of the shooting. The stranger had been subpoenaed on the part of the people, and, when called, failed to respond. No effort was made to produce him, and no impediment to doing so was shown. The defense asked that the prosecution be required to place him upon the stand for examination, which request was refused. And it was held that the excuse attempted to be made for failing to produce the witness, i. e., that his testimony could only have been cumulative, under the circumstances of the case, was insufficient; that, besides the actors in the affray, he was the only person who appeared to have been in a position to see what took place inside the saloon; that presumptively he could have given evidence of high importance, and in some particulars his evidence, in all probability, would have stood alone.

Assault with Intent to do Great Bodily Harm less than Murder.

People v. Deitz, 58 Mich., 419, where the names of certain witnesses, who were shown by the preliminary examination to have witnessed the affray at a distance of from 35 to 40 rods, were not indorsed on the information, and the court declined to require the prosecuting attorney to call them on request of the respondent's counsel, although present in the court room, and they were afterwards called and sworn on behalf of the respondent. And it was held:

a.—That it is not correct practice to compel the defense to call witnesses present at the occurrence for which the party is on trial.

b.—That it is incumbent upon the prosecuting attorney not only to have such witnesses present in court, but to have them sworn in behalf of the people, and he may then examine them much or little, as he

this failure by saying that he was only one of several witnesses of the transaction, so that his testimony could only have been cumulative. The excuse, under the circumstances of the case, is not sufficient. Besides the actors in the affray, McCacklin was the only person who appears to have been in position to see what took place inside the saloon, and presumptively he could have given evidence of high importance. In some particulars his evidence, in all probability, would have stood alone."

It is true that the witness, Germaine, was the sister of the respondent, but she was also Ramsdell's fiancé. Under the circumstances, I do not

choose; thereby affording the respondent an opportunity of cross-examination without prejudicing his case by the bias of the witness, if he should have any.

c.—That it is incompetent for the prosecuting attorney, after refusing to call such a witness, to comment upon the fact that he was sworn upon the preliminary examination, or that he was present in court, and was not called by the respondent.

Assault and Battery.

People v. Kenyon, 93 Mich., 19, holding that where the only eye-witnesses were the respondent and his wife, the complaining witness and his son, and a fifth party who saw a portion of the affray, such party is an important witness, and should be produced by the people, and the court has power to compel the prosecuting attorney to call such party.

Burglary.

People v. Gordon, 40 Mich., 716, where the only evidence connecting respondent with the offense was his arrest with a satchel containing the articles taken from the burglarized building. The prosecution had in court a person whose name was indorsed on the information, and who had been convicted of the burglary for which respondent was being tried, but failed to call him as a witness. And it was held that the suppression of this positive testimony, which on every consideration of justice the prosecution was bound to produce, entitled the respondent to every inference that could be drawn from it.

Larceny.

1. *People v. Long*, 44 Mich., 296, where an officer testified that he saw respondent's father search his son immediately after the theft, and that he took from him what appeared to be a gold piece, and put it in his own pocket. Respondent's counsel moved to strike out this testimony unless the prosecution called the father as a witness. And it was held that the testimony was admissible as a part of the *res gestæ*; that the failure to call the father was not, under the circumstances, erroneous; that there was no claim that he knew anything more about the transaction than the finding of the gold piece; that it appeared that he was present in court, and active in aiding the defense; that his position in regard to the facts was not such as to make him a necessary witness for the people to enable respondent to be protected against a false accusation, and his relation to the defense made it still less important.

2. *People v. Wolcott*, 51 Mich., 612, 618, where the name of respondent's wife was indorsed on the information, and counsel for respondent insisted that she should be called by the people, so that the defense might have an opportunity for cross-examination. And it was held that the court was correct in declining to order this, the relationship of the witness to the accused being sufficient for excluding her.

3. *People v. Henshaw*, 52 Mich., 584, where, in a prosecution for larceny from the person, the disputed question of fact was as to the identity of the respondent as the one who committed the offense. As the prosecution was about to rest the case, the counsel for the respondent requested that the prosecution be directed to call as a witness a person then in the court room, whose name was indorsed on the information, and who helped to arrest the robbers. And it was held that the refusal of the court to grant the request was not error; that it was not claimed that the proposed witness was present at the robbery, and upon the question of identity he was no more qualified to testify than any other person who had acquaintance with the person to be identified.

Receiving Stolen Property.

People v. Goldberg, 39 Mich., 545, where respondent was convicted upon the testimony of two of the thieves, and of a witness who testified to conversations with the respondent which corroborated the testimony given by the thieves about respondent's reception of the property. The testimony of two other witnesses tended to show that the goods were found at the house of respondent's brother-in-law. The brother-in-law was in court, but was not called by the people. Respondent's counsel asked the court to require the prosecution to call the brother-in-law as a witness, which the court refused to do. And it was held that the offense consisted in the guilty reception of the property; that the evidence for the people was aimed to make out that this was a distinct personal act, identified by direct proof, and that it was accomplished and complete apart from any subsequent deposit at the brother-in-law's; that it was not pretended that the brother-in-law was present at the fact, and the evidence imported that he was not; and that the case did not, therefore, impose any duty upon the prosecution to call the brother-in-law as a witness.

Uttering Forged Instrument.

People v. Swetland, 77 Mich., 53, where the persons whose names purported to be affixed as witnesses to the forged instrument were not produced, nor their names indorsed on the information, and no showing was made that the names were fictitious. And it was held that their testimony was a necessary part of the people's case, which could not be omitted without good excuse.

Keeping House of Ill Fame.

People v. Wright, 90 Mich., 362, where it appeared that two men, one of whom was an officer, visited the house, and the officer testified to conduct on the part of his companion and an inmate tending to show acts of prostitution. The name of the companion was not indorsed on the information, nor was he sworn as a witness on the preliminary examination. And it was held that the refusal of the trial court to compel the prosecuting attorney to call him as a witness was not error, the transaction testified to not constituting the offense charged, and only being one of the circumstances in proof.

think that the relation of Miss Germaine would justify the failure to examine her.

I think that the conviction should be set aside, and a new trial ordered.

The other justices concurred. (101 Mich. Rep., 485.)

JOHN HURST, PROSECUTING ATTORNEY OF CHIPPEWA CO. v. FRANK R. WARNER.

Constitutional law—Delegation of legislative power—State Board of Health—Disinfection of baggage—Validity of rules.

1. Act No. 230, laws of 1885, as amended by act No. 47, laws of 1893, entitled "An act to provide for the prevention of the introduction and spread of cholera and other dangerous, communicable diseases," and the effect of the provisions of which is to declare it unlawful for any person to refuse to permit his baggage and personal effects to be disinfected in accordance with the rules and regulations of the State Board of Health, made and established pursuant to said act, is not unconstitutional for the reason that it delegates to the State Board of Health legislative power, in contravention of section 1 of article 4 of the Constitution, which vests the legislative power in a Senate and House of Representatives.¹
2. By section 3 of the act, the State Board of Health is authorized to establish general rules, and by an inspector acting by virtue thereof, to detain railroad cars or other public or private conveyances whenever it shall be shown to the satisfaction of the board, or to the inspector, as provided in such rules, that such cars or other conveyances contain any passenger, person or property which has been exposed to cholera, diphtheria, or other dangerous, communicable disease, or when it shall be shown to the satisfaction of the board or inspector as aforesaid that any passenger, person or property is being transported on such cars or other public or private conveyance from any locality from within or without this State where any such dangerous, communicable disease exists, and where, under the circumstances shown to such board, any such persons or property are likely to carry infection of such dangerous, communicable disease. And it is held that a rule which does not make it a prerequisite to the inspection authorized by section 3 that the baggage being transported come from a locality where such dangerous, communicable disease exists, as ascertained either by the board or inspector, is broader than the statute, and cannot be sustained.
3. The court are not to be understood as intimating that it would not be competent for the legislature to provide for the disinfection of all baggage, where, in the opinion of the State Board of Health, from the prevalence of a contagious disease, such precaution is necessary.

Certiorari to Chippewa. (Steere, J.) Argued June 28, 1894. Decided December 27, 1894.

Relator applied to the circuit court for a *mandamus* to compel respondent to issue a warrant for the arrest of a person charged with the violation of a rule adopted by the State Board of Health under act No. 47, laws of 1893, and brings *certiorari* to review an order denying the writ. Affirmed. The facts are stated in the opinion.

A. A. Ellis, Attorney General, for relator.

E. C. Chapin (John D. Conely, of counsel), for respondent.

¹ With this case in 28 L. R. A., 484, is an extensive note on quarantine regulations by health authorities.

MONTGOMERY, J. The plaintiff, who is prosecuting attorney for the county of Chippewa, on the 24th of November, 1893, presented to the respondent, who is a justice of the peace of said county, a complaint alleging that one Robert B. Finch was a station agent of the Minneapolis, St. Paul & Sault Ste. Marie Railroad Company at Sault Ste. Marie, and on the 23d of November, 1893, in charge of a train belonging to said railway company; that on said train there was baggage, consisting of clothing, wearing apparel, etc., belonging to one Edmund Watelet, an immigrant, late of Havre, France, who was traveling through Michigan to Minneapolis, and whose baggage was liable to be disinfected by one Thomas N. Rogers, an inspector (authorized by the Michigan State Board of Health), to disinfect the baggage of all immigrants destined to pass into or through the State of Michigan; that said Finch was requested by said Rogers to detain said baggage for disinfection and inspection, and wilfully refused so to do, and proceeded with said train and said baggage in and through Michigan, in violation of rule No. 2, framed and published by the Michigan State Board of Health under act No. 230 of the laws of 1885, as amended by act No. 47 of the laws of 1893 of this State. Upon the presentation of this complaint the respondent was requested by the relator to cause a warrant to be issued, based upon said complaint, but declined to do so for the reason that act No. 47 of the laws of 1893 was unconstitutional and void, and for the further reason that, if said act was not void, rule No. 2, upon which the prosecution was based, was not authorized by said act, and that the board of health exceeded its authority in passing said rule. The relator then applied to the circuit judge for a *mandamus*, which was refused, and *certiorari* has been issued to review the decision of the circuit judge. The two questions presented here are those which determined the action of the justice.

1. It is contended, and the circuit judge held, that the statute in question is unconstitutional for the reason that it delegates to the State Board of Health legislative power, in contravention of section 1 of article 4 of the constitution, which provides that "legislative power is vested in a senate and a house of representatives." To determine the question involved, it is necessary to refer at some length to the provisions of the statute. Section 1 provides that: "Whenever it shall be shown to the satisfaction of the State Board of Health that cholera, diphtheria, or other dangerous, communicable disease exists in any foreign country, neighboring state, or locality within this State, whereby the public health is imperiled, and it shall be further shown that immigrants, passengers, or other persons seeking to enter this State, or to travel from place to place within this State, are coming from any locality where such dangerous, communicable disease exists, and are likely to carry infection of such dangerous, communicable disease, the State Board of Health shall be authorized to establish a system of quarantine for the State of Michigan, or for any portion thereof." Section 2 provides that: "Such quarantine shall be for the purpose of preventing all immigrants, passengers or other persons, under the circumstances mentioned in section one of this act, from entering the State or from going from place to place within the State, who, in the opinion of the State Board of Health, or in the opinion of an inspector duly appointed by said board, are likely to carry infection of cholera, small-pox, diphtheria, or other dangerous, communicable disease; and for the detention of all such persons outside the borders of the State, or if already within the State, at the places where they may be or at

the place they have been exposed to or have contracted such dangerous communicable disease, or at such suitable place as such board may provide, during the period of the incubation of such disease, or of its existence if already developed, and until in the opinion of the State Board of Health such persons are free from all danger of infection." Section 3 provides that: "The State Board of Health is authorized to establish general rules, and, by an inspector acting by virtue thereof, to detain railroad cars or other public or private conveyances, whenever it shall be shown to the satisfaction of such board, or to the inspector as provided in such rules, that such cars or other conveyances contain any passenger, person or property which has been exposed to cholera, diphtheria, or other dangerous communicable disease, or when it shall be shown to the satisfaction of such board or inspector as aforesaid, that any passenger, person or property is being transported on such railroad cars or other public or private conveyance from any locality within or without this State were any such dangerous, communicable disease exists, and where, under the circumstances shown to such board, such persons or property are likely to carry infection of such dangerous communicable disease. In such case said board may, by its duly constituted inspectors, remove, isolate, place under the care of local boards of health, order to be returned to the places whence they came, or dispose of in any other manner it may consider proper, all railroad cars or other conveyances, all passengers in such railroad cars or other conveyances, when there is reason, as aforesaid, to believe such may have contracted or become infected with any dangerous, communicable disease, or have been exposed or infected by any such disease in a manner likely to render them bearers of infection."

* * * Section 4 provides: "All such persons, their baggage and other personal effects, and all such conveyances shall be disinfected under such rules and regulations as the State Board of Health may establish for the purpose of carrying into effect the provisions of this act before such persons or baggage or conveyances shall be permitted to enter the State, or to proceed to their or its destination, if already in the State." Section 5 provides for the disinfection of goods, merchandise, conveyance, or other property which the State board have reason to believe may carry the germs of cholera, or other dangerous, communicable disease, and, under the circumstances mentioned in sections 2 and 3 of the act, to prohibit the entry of such goods, merchandise, or other property into the State, or their being moved, if within the State, until such disinfection shall be accomplished. Section 6 provides: "It shall be the duty of the State Board of Health to frame and publish rules for the inspection, isolation, detention and disinfection contemplated in this act," and further provides as follows: "Whoever shall wilfully violate the rules of the State Board of Health, made in pursuance of this act, or the order, by its duly appointed inspector, made in obedience to such rules, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to payment of a fine of one hundred dollars and costs of prosecution, or imprisonment in the county jail for a period not to exceed ninety days," etc.

As was said by Chief Justice Marshall, in *Wayman v. Southard*, 10 Wheat, 1: "It will not be contended that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But congress may certainly delegate to others powers which the legislature may rightfully exercise itself. * * * The difference between the departments undoubtedly is that the legislature makes, the

executive executes, and the judiciary construes the law. But the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry. In *re Griner*, 16 Wis., 457, Justice Cole, speaking for the court, and referring to the rule that the powers of the different departments are not to be confounded, or delegated by the one department to the other, said: "Most of the propositions stated are recognized political maxims, under our form of government. It is only the conclusion or deduction from those propositions about which any doubt can exist. No one will seriously contend that congress can delegate legislative power to the president. But a distinction must be made of 'those important subjects which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the detail.' It would seem that the power given to the president to make all rules and regulations to carry into effect the law for calling out the militia is of the latter character. Congress might have regulated by legislation the whole details of the draft, if it had thought proper to do so. But having, in the most ample manner, clothed the president with power to call forth the militia, it further provided that he should make all proper rules and regulations for the enforcement of the draft, where state laws upon the subject were defective. * * * This no more partakes of legislative power than that discretionary authority intrusted to every department of the government in a variety of cases. The practice of giving discretionary power to other departments or agencies, who were intrusted with the duty of carrying into effect some general provisions of the law, had its origin at the adoption of the constitution, and in the action of the first congress under it, as the federal legislation abundantly shows." See, also, as bearing upon this question, *Field v. Clark*, 143 U. S., 649; *Locke's Appeal*, 72 Pa. St., 491; *Railroad Co. v. Smith*, 70 Ga., 694. In the present case we think it can hardly be doubted, under the authorities cited, that the legislature might have provided for the disinfection of the baggage and personal effects of travelers coming from infected ports, under the direction of an inspector of the board. To have made such a law effective, it would have been essential that the inspector should have been given authority to act, and to have made it a misdemeanor to refuse to recognize his authority. The present act does nothing more, except that it provides that such disinfection shall take place under general rules to be adopted by the State Board of Health. The rules relate to matter of detail. It is well known that there are different methods of disinfection. It was properly left to the board, by the legislature, to determine as to these methods; and, instead of intrusting it to the discretion of the individual inspector, it was prescribed that general rules should be adopted. We are referred to the case of *Senate of Happy Home Club v. Board of Sup'rs*, 99 Mich., 117, as authority for respondent's contention. The statutes considered in that case beare no analogy to the statute under consideration. The power was there delegated to a private corporation to make rules governing the conduct of the accused, the observance of which rules should operate to acquit and discharge the accused. This did not leave a discretion in public officials as to the mere details of the operation of the law, but was an attempt to delegate power to a private corporation, which it was clearly beyond the authority of the legislature to do. Reliance seems to have been placed by

the circuit judge upon two cases of *ex parte Cox*, 63 Cal. 21, and *Board of Harbor Commr's v. Excelsior Redwood Co.*, 88 Cal., 491. In the latter case an attempt was made to confer upon the board of harbor commissioners the power to prescribe rules, and fix the penalty for their violation, which clearly distinguishes it from the present. In the case of *ex parte Cox* the petitioner was convicted of a misdemeanor consisting of a violation of a rule and regulation of the Board of State Viticultural Commissioners. The act of the legislature in question declared that the board should have power to declare and enforce rules and regulations in the nature of quarantine, to govern the manner of and restrain or prohibit the importation into the State of infected articles and empty fruit boxes, and declared that a wilful violation of the quarantine regulations of the board should be a misdemeanor. The courts say, "The act before us does not say it shall be unlawful to import, distribute, or dispose of infected articles, but it attempts to confer upon the board the power to so declare." We think our statute is distinguishable in principle from the one here dealt with. The effect of the provisions of our statute is to declare it unlawful for any person to refuse to permit his baggage and personal effects to be disinfected in accordance with the rules and regulations of the board of health. The rules and regulations are limited to the purposes which are specifically described by the act. We think the statute is constitutional.

2. As above stated, by the act of 1893 it was not intended to confer upon the board any power beyond that of fixing the method to be adopted in carrying into effect the details of the isolation, inspection, disinfection, etc., provided for by the law itself. By the first section the board was authorized to establish a quarantine when it is shown to the satisfaction of the board that dangerous communicable disease exists in any foreign country, neighboring state or locality within this State and when it is further shown that immigrants, passengers, or other persons seeking to enter this State, or to travel from place to place within this State, are coming from any locality where such dangerous, communicable disease exists. By section 3 it is provided that: "The State Board of Health is authorized to establish general rules, and, by an inspector acting by virtue thereof, to detain railroad cars or other public or private conveyances whenever it shall be shown to the satisfaction of such board or to the inspector as provided in such rules, that such cars or other conveyances contain any passenger, person or property which has been exposed to cholera, diphtheria or other dangerous, communicable disease, or when it shall be shown to the satisfaction of such board or inspector as aforesaid, that any passenger, person or property is being transported on such railroad cars or other public or private conveyance from any locality within or without this State where any such dangerous, communicable disease exists, and where under the circumstances shown to such board, such persons or property are likely to carry infection of such dangerous, communicable disease." A careful examination of the rules declared by the board, and particularly of the one alleged to have been violated, leads us to the conclusion that the board exceeds the authority conferred by the statute, by the promulgation of the rule in question. The rules recite the existence of communicable diseases in various foreign countries from which immigrants are coming to the United States in large numbers, and then proceeds, by rule 2, "Except as hereinafter specifically excepted, all

baggage of all immigrants and all containers of all such baggage destined to pass into or through Michigan must be detained until disinfected." The exceptions mentioned are: First, "baggage bearing a certificate issued by an inspector authorized or accredited by the Michigan State Board of Health." Second, baggage contained in sealed cars, such seals not to be broken or the cars opened in the State of Michigan. Third, "hand baggage of immigrants used en route, and known to have crossed the ocean in ships uninfected with any dangerous communicable disease, or bearing a certificate of disinfection, issued by an inspector authorized or accredited by the Michigan State Board of Health." Under these rules the baggage of all immigrants was subject to disinfection, whether such immigrant came from a port or locality where any dangerous, communicable disease existed or not. Indeed, there was no allegation in the complaint that the baggage in question came from such locality. This is beyond the power of the board. We do not intimate that it would not be competent for the legislature to provide for the disinfection of all baggage, where, in the opinion of the board of health, from the prevalence of a contagious disease, such precaution is necessary. But, instead of doing so, it is provided by section 3 that the board is authorized to establish general rules, and, by an inspector acting by virtue thereof, to detain railroad cars, or other public or private conveyances, etc., whenever it shall be shown to the satisfaction of such board, or to the inspector, as provided in such rules, that such cars or other conveyances contain any passenger, person or property which has been exposed, etc., or when it is shown to the satisfaction of such board or inspector as aforesaid that such passenger, person or property is being transported from any locality where any such dangerous, communicable disease exists, and where such persons or property are likely to carry infection of such dangerous, communicable disease. The rule in question did not make it a prerequisite to the inspection that the baggage being transported come from a locality where such disease existed, as ascertained either by the board or inspector, and in this respect was broader than the statute and cannot be sustained.

It follows that the justice was right in refusing to issue the warrant. We have, however, gone at length into the consideration of the provisions of the statute to show to what extent authority is conferred upon the board, as the question involved is one of great public importance. The judgment will be affirmed. The other justices concurred. (102 Mich. Rep., 238.)

THE PEOPLE v. GEORGE L. LAIRD.

Criminal law—Privileged communications—Evidence of good character—Instructions.

1. Where, in a prosecution for burglary, the defense is an alibi, and the officers who made the arrest explain their presence in the building by testifying that they expected it to be entered, it is not error to reject testimony, sought to be drawn out on their cross-examination, relative to the source from which they derived their information that a burglary was premeditated.
2. A case might arise where a person claiming to have been innocently at the place where the crime was committed, at the solicitation of a person suspected of being the informant, would be entitled to inquire whether such person was the informant.

3. Where, in a prosecution for burglary, the sole disputed question of fact is as to the presence of the respondent at the scene of the burglary, and there is positive evidence on both sides of the question, it is error to instruct the jury that, if they find that there is positive evidence that the respondent did commit the offense, they are to pay no attention to the evidence which he has introduced tending to show his previous good character, such evidence being entitled to consideration in determining the disputed question.¹

1 GOOD CHARACTER AS A DEFENSE IN CRIMINAL CASES.

For cases bearing upon the question of proof of good character in criminal cases, and the effect that should be given to it by the jury, see

General Rules Applicable to the Subject.

1. *People v. Garbutt*, 17 Mich., 9, 26, holding that good character is an important fact with every man, and never more so than when put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime; that there are cases where it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character; that the most clear and convincing cases are sometimes satisfactorily rebutted by it, and a life of unblemished integrity becomes a complete shield of protection against the most skillful web of suspicion and falsehood which conspirators have been able to weave; that good character may not only raise a doubt of guilt which would not otherwise exist, but it may bring conviction of innocence; that in every criminal trial it is a fact which the respondent is at liberty to put in evidence, and, being in, the jury have a right to give such weight as they think it entitled to.

2. *People v. Mead*, 50 Mich., 228, 233, holding that a person on trial for crime is entitled in all cases to the benefit of testimony as to his good character; but, if the evidence of his guilt is convincing beyond a reasonable doubt, he should be convicted, notwithstanding his good reputation.

3. *People v. Evans*, 72 Mich., 387, holding that the failure of a respondent to offer affirmative evidence of his good character raises no legal inference that he is guilty of the offense charged, or that his character is bad, and it is the gravest error for the court to permit the prosecuting attorney to comment upon the absence of such testimony, which error is not cured by an instruction to the jury not to consider the argument.

4. *People v. Marks*, 80 Mich., 555, holding that where a respondent introduces evidence of his good character, which is not attempted to be rebutted by the prosecution, it is prejudicial error for the court to instruct the jury that, while the law permits him to make such proof, the people are prohibited from showing his bad character.

5. *People v. Mills*, 94 Mich., 630, holding that, where a respondent's general character is put in issue by the defense, comment upon that character is clearly proper.

6. *People v. Jassino*, 100 Mich., 536, holding that evidence of good character is admissible not only in a case where doubt otherwise exists, but may be offered for the purpose of creating a doubt.

Illustrative Cases.

1. *People v. Garbutt*, 17 Mich., 9, 26, where, in a prosecution for murder, evidence was adduced by the respondent to establish his uniform good character previous to the time of the alleged offense, and the court was requested to instruct the jury that they had a right to consider whether such evidence tended to rebut the presumption of malice. And it was held that the proposed instruction was correct in substance, and that the respondent was entitled to it without explanation or qualification; that the evidence could have no bearing whatever except upon the question of malicious intent; that to refuse the instruction, therefore, was equivalent to holding, or at least leaving the jury to infer, that the evidence, which was lawfully put into the case, was immaterial after it was in.

2. *Campbell v. People*, 34 Mich., 351, where, in a prosecution for rape, the court instructed the jury that the respondent had offered evidence tending to show his good character; that it was not usual, perhaps, for good men to commit crime, but it was possible, and men who have stood high have been convicted; that the jury should consider the evidence with the rest, and give the prisoner all the benefit of it that they believed him entitled to. And it was held that the instruction was calculated to insure to the respondent the full benefit of his good reputation.

3. *Brownell v. People*, 38 Mich., 732, 736, holding, in a prosecution for murder, that it was entirely inadmissible, in answer to proof of the general good reputation of the respondent, to receive evidence of an alleged act of violence against another person than the deceased, at a former time and different place; that the respondent could not (be expected to) be prepared to meet any such testimony or explain it, and its introduction might seriously prejudice the jury.

4. *People v. Harrison*, 93 Mich., 594, where, in a prosecution for larceny, the circuit judge instructed the jury that a good character was of importance to a person charged with crime, and that the jury had the right to consider whether a person with a good character would be less liable to be guilty of crime than one of bad habits and character. And it was held that this is undoubtedly the true rule, and it is so beneficial in its character that it is entitled to the constant recognition of all courts when engaged in the trial of any person charged with the commission of a crime.

5. *People v. Pickett*, 99 Mich., 613, where, in a prosecution for arson, testimony was introduced as to the general good character of the respondent, the question put to the witness being, "Do you know what his reputation for good moral conduct is?" On cross-examination the witnesses were interrogated as to the specific acts of the respondent which occurred prior to the fire. And it was held that such interrogation was proper.

6. *People v. Jassino*, 100 Mich., 536, where, in a prosecution for an assault with intent to do great bodily harm less than the crime of murder, the court instructed the jury that a man's good character is a valuable thing under all circumstances; that it is proper evidence to be considered by the jury in doubtful cases to determine whether or not a man having that good character would commit the offense charged; that it often avails and should avail, to acquit a man under such circumstances; but that, when there is positive proof of the commission of an offense, good character cannot avail to overthrow the proof. And it was held that the instruction was erroneous, in that it deprived the respondent of the benefit of proof of good character if the jury should find positive evidence tending to show the commission of the offense.

Error to recorder's court of Detroit. (Chambers, J.) Argued June 28th, 1894. Decided September 25, 1894.

Respondent was convicted of the crime of burglary, and sentenced to imprisonment in the State Prison for seven years. Judgment reversed. The facts are stated in the opinion.

George Cox, for respondent.

A. A. Ellis, Attorney General, and *Allan H. Frazer*, prosecuting attorney, for the people.

McGRATH, C. J. Respondent was convicted of burglary. The police department, on the evening of December 15, 1893, received information that a burglary would probably be committed some time during the night, or early the following morning, at the residence of one Tannenholtz. Acting on this information, six officers were sent by Capt. Bachman to Tannenholtz's place, with instructions if a burglary was committed to arrest the parties. The officers informed Tannenholtz, procured from him a key, and secreted themselves upon the premises. At a few minutes after 5 in the morning, the rear door was broken open, and the place entered. Just after the place was entered, several shots were exchanged, and the burglars ran. Respondent was recognized by one of the officers at the door and by two other officers in the course of the chase which followed. The defense was an alibi. The officers, in explaining their presence in the saloon,¹ testified that they expected the place to be entered. On cross-examination, each officer was asked a number of questions relative to the source from which they derived their information that a burglary was premeditated, but the testimony was rejected. The general rule is that persons engaged in the detection of crime are not bound to disclose the sources of the information which led to the apprehension of the prisoner. The reason for the rule is that such disclosure can be of no importance to the defense, and may be highly prejudicial to the public in the administration of justice by deterring persons from making similar disclosures. 1 *Greenl. Ev.*, § 250; *Best Ev. (Chamberlayne's 1st Ed.)*, § 578, note 1a; *Rex v. Akers*, 6 Esp., 125; *Hardy's Trial*, 24 Howell St., Tr. 808; *U. S. v. Moses*, 4 Wash. C. C., 726; *Attorney General v. Briant*, 15 Mees. & W., 169; *State v. Soper*, 16 Me., 293; *Gray v. Pentland*, 2 Serg. & R., 23-32; *Worthington v. Scribner*, 109 Mass., 487. In the last case cited, Gray, J., says: "It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in the performing of this duty, without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice, therefore, will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the par-

¹ The first story of the building was occupied as a saloon, and the second as a dwelling.

ticular case, but upon general grounds of public policy, because of the confidential nature of such communications." And our own court, in *People v. Davis*, 52 Mich., 569-573, recognizes the rule. Mr. Justice Cooley in that case says: "And we are not called upon in this case to consider whether there may not be cases in which the prosecuting attorney would be excused, in the interest of the State, from disclosing what had been told to him with a view to the commencement of criminal proceedings. There would be strong reasons in many cases why the counsel of the State should be inviolably kept; and nothing we shall say in this case will be intended to lay down a rule except for the very case at bar, and others standing upon the same facts."

The rule is broad enough to protect the information as well as the informant, at least so far as it is necessary to shield the informant. In the present case the question involved was the presence and identity of the respondent at the scene of the burglary, and the court permitted a disclosure of the information so far as it related to him. A case might arise where a person claiming to have been innocently at the place of the crime, at the solicitation of a person suspected of being the informant, would be entitled to inquire whether such person was the informant. *U. S. v. Moses supra*. But no such case is here. The defense here was that respondent was not present. Much is said in the respondent's brief about the methods of the police department. The police are dealing with dangerous characters. Burglary is a profession. Men known to be connected with the profession infest communities. They are desperate characters, and take life to facilitate escape. The duty of the police lies beyond the protection of the public from a particular offense. It will not do to lay down the rule that, if a burglary is suspected, it is the duty of the police officers to prevent the commission of that particular offense, rather than lie in wait and secure the guilty parties. In such case the police do not encourage the commission of the crime, but simply apprehend parties bent upon the crime, who, in carrying out plans already formulated, rush into the arms of the officers. Even an informant accompanying his associates does not necessarily encourage their purpose, and it is not proper that he should, but he simply acquiesces in a plan already formed. We find no error in the record in respect to these matters. The conviction must, however, be set aside for other reasons.

Several witnesses were called as to the previous good character of the respondent, and the people called no witnesses on that subject. The court instructed the jury that "good character is always admissible, gentlemen, in criminal cases, and may be always received by you, but it is for you to say whether it will have any weight with you in coming to your verdict or not. The testimony of the defense may be introduced to show what the character of the defendant is; and if the testimony is incompatible with your judgment in regard to defendant's good character, if you think it is insufficient, or if you think defendant is guilty without any testimony with reference to character, it would be your duty to say so. The defendant might have a good character up to a certain time, and afterwards he might have committed a crime. If a crime was absolutely committed, and you are satisfied beyond a reasonable doubt, then good character would be comparatively useless, so far as you are concerned, because men sometimes have to have some commencement in crime, and a man might have a good reputation and a good character most all of his life, and he may commit some crime; and it does not follow, because he

has always had a good reputation, that, therefore, he is a good man. It is a question for you to say whether, if there is any doubt in regard to the case, whether you believe that testimony, or whether you will accept testimony to show that his character is good, when you have positive evidence that his character is not good, and that is a question for you to say entirely. In regard to the man's reputation, you have heard the testimony introduced here of some of the witnesses that defendant had borne a good character up to the time of this offense; and it is a question for you to consider whether a man who has lived a good life and enjoyed a high reputation for thirty-five or forty years—whether he would be likely to commit the offense charged. If you believe he would, then, of course, character would be of no importance. If you believe that he did commit the offense, and you find that there is positive evidence that he did commit it, of course you would pay no attention to the man's reputation." This instruction is erroneous, in that it authorizes the jury to dissociate the testimony as to good character from the other testimony in the case. The sole question was to respondent's presence at the scene of the burglary. The evidence upon that question was conflicting. There was positive evidence that respondent was present, but there was also testimony, equally as positive, that he was not. The testimony as to good character supplemented the latter class of testimony, and was entitled to consideration in determining the disputed question. The court might as well have said: "If you find positive evidence that respondent was present, then you may reject the testimony which tends to show that he was not." The precise question was before this court in *People v. Jassino*, 100 Mich., 536. The judgment is reversed and a new trial granted.

GRANT and MONTGOMERY, J. J., did not sit. The other justices concurred. (102 Mich Rep 135.)

THE PEOPLE v. DAVID W. TITMUS.

Criminal law—Perjury—Unauthorized oath.

Under How. Stat. Sec. 9236, which provides that, "If any person of whom an oath shall be required by law shall willfully swear falsely in regard to any matter or thing respecting which such oath is authorized or required, such person shall be deemed guilty of perjury," a charge of perjury cannot be predicated upon the sworn statements of a person who was subpoenaed to appear before a justice of the peace to furnish testimony upon which to base a complaint for a violation of the liquor law, no complaint, oral or written, having been made to the justice, at the time said statements were made, of the commission of such offense.

Error to Livingston. (Person, J.). Submitted on briefs June 29, 1894. Decided October 16, 1894.

Respondent was convicted of perjury, and sentenced to imprisonment in the State House of Correction and Reformatory at Ionia for two years. Judgment reversed, and respondent discharged. The facts are stated in the opinion.

S. S. Abbott and *L. S. Montague*, for respondent.

A. A. Ellis, Attorney General, and *D. Shields*, prosecuting attorney for the people.

MCGRATH, C. J. Defendant was convicted of perjury. It appears that on the 2d day of March, 1894, a subpoena was issued by a justice of the peace, commanding the respondent to appear before said justice forthwith to testify "in an action now pending before me, and then and there to be tried, between the people of the State of Michigan, plaintiff, and James Hoag, defendant," etc. Respondent appeared, and was examined upon oath, and the charge is predicated upon the statements then and there made. Upon the trial in the circuit, upon cross-examination, the justice testified as follows: "Sheriff Chase came in, and requested me to subpoena Mr. Titmus to come before me and testify. He said he wanted to see if there was testimony enough to make complaint against the saloon keepers. There was not then a complaint before me. A complaint had not been made before me for the arrest, or a complaint of the violation of the law by Mr. Hoag; that is, there had been no written complaint made at that time, and no complaint under oath, and there was yet no complaint of any violation of this liquor law, concerning these men, and there was no such complaint up to the time of the issuing of the subpoena and the time of taking the testimony, and there was no judicial inquiry or proceedings before me at the time I issued the subpoena, or at the time of taking the testimony. The complaint written against Mr. Hoag was made on the 5th day of March, three days after the taking of the testimony of respondent. Sheriff Chase made the complaint. I did not examine any other witnesses, or take any other testimony, except the foregoing. The Court: I wish you would ask if the sheriff had made any complaint not under oath. (To which the respondent, by his counsel, objected. The testimony was taken subject to the objection, and excepted to.) A. Yes. The sheriff came into my office before I issued the subpoena, and said the circuit judge had ordered him to get out a subpoena, and subpoena some witnesses, and see if he had sufficient cause to make complaint against Mr. Hoag and Mr. McDonough, I think, and any others; and he requested me to issue some subpoenas, and this is the one I have issued. The sheriff at that time claimed the offense to have been committed on the 1st day of January last, in the saloon of Benjamin Hoag, in Fowlerville, in this county; and he wanted to discover, also, if he could, whether there was any other offense committed on that day in the village of Fowlerville, in this county. The offense and offenses mentioned were for violation of the liquor law. It was a well-known fact that whisky had been sold upon that day, and from the trial of the case in the circuit court, that had just been determined before that (in which I was an attorney), of course he knew that I knew what he wanted, so he (sheriff) did not explain very much what he did want. The case I refer to is the case of the *People v. Bristol, William Brooks and Fred Miller*, tried here in this court room before a jury. Before issuing a subpoena, some testimony had been given in that case about the saloon of Hoag having been opened on January 1st."

Upon this testimony, it cannot be seriously insisted that a complaint was pending before the justice when the summons was issued, or when the testimony was taken, upon which the charge is based. It is true that in answer to a question put by the court, as to whether the sheriff had made a complaint not under oath, an answer is given in the affirmative; but this is a legal conclusion, unsupported by the statement of facts. The justice proceeds at once to give just what the sheriff did say, viz., that he had been ordered to give out the subpoenas, "and see if he had sufficient cause to make a complaint against Mr. H. and Mr. McD., * * * and

many others." The language of the statute defining the offense here charged is, "if any person of whom an oath shall be required by law, shall wilfully swear falsely, in regard to any matter or thing, respecting which such oath is authorized or required, such person shall be deemed guilty of perjury." 2 How. St. § 9236. The information alleged that on the 2d day of March, 1894, at, etc., "complaint in due form of law * * * having been then and there made." In *People v. Fox*, 25 Mich., 492, 496, Mr. Justice Cooley, speaking for the court, says: "There must be an oath authorized by law, an issue or cause to which facts were material, and a false statement regarding such facts upon such issue, or in such cause. Such would be the case at the common law, and, if it be claimed that this is statutory perjury, the information is not aided, for by the statute it must appear that the oath is one required or authorized by law. * * * Had the information alleged that the affidavit was used on the hearing of the motion, a different case would have been presented, which might require consideration; but that was neither alleged, nor, consequently, could be proved. In fact, the record shows that it was not filed until the day after the motion was heard, but this, under this information, was immaterial." *People v. Gaige*, 26 Mich., 30. The judgment must be reversed, and the respondent discharged.

GRANT, J., did not sit. The other justices concurred. (102 Mich. Rep.)

THE PEOPLE v. JOHN J. WHITEMORE.

Criminal law—Return of examining magistrate—Malicious threats—Blackmail—Pleading—Evidence—Disqualification of prosecutor.

1. The failure of an examining magistrate, on requiring a respondent to recognize to answer the offense charged, to certify his finding that the offense has been committed—his finding being "that there is probable cause to believe that said offense had been committed, and probable cause to believe the respondent guilty thereof,"—will not support an objection that the information filed on the basis of his return was not properly filed.
2. Respondent was convicted of maliciously threatening to accuse one Paul Lucas of the crime of perjury, in violation of How. Stat. Sec. 9093, which provides that "if any person shall, either verbally or by any written or printed communication, maliciously threaten to accuse another of any crime or offense, * * * with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will, he shall be punished," etc. The complaint which was followed by the warrant, charged that the respondent did, on a certain day, wilfully and maliciously, verbally threaten to accuse the said Paul Lucas of wilful and corrupt perjury, and did, on the day and at the place named, threaten to make a criminal complaint for such offense against the said Lucas, unless he would sign and execute a deed of certain lands owned by him, and situated in the State of Minnesota, with the intent and purpose of procuring the signature of said Lucas against his will to said deed, and with intent to injure and defraud said Lucas, contrary to the form of the statute, etc. And it is held:
 - a. That the complaint shows sufficiently that the threats were verbal.
 - b. That the complaint follows the language of the statute in its averments as to the making of the threats, and while in the precedents, the name of the party to whom the threats were made is usually set out, the omission to do so is not fatal.
 - c. That the complaint sufficiently sets out the intent; that the statute makes it an offense to make such threats with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will; and that the intent to procure the signature of Lucas against his will to a deed of land was an intent to compel him to do an act against his will, to wit: to affix his signature to a deed.

3. The attorney for the plaintiff in a suit pending in Minnesota, came to Michigan for the purpose of taking the depositions of certain witnesses in the case. Among other witnesses, he examined one of the defendants, who held the legal title to the land in dispute, which plaintiff claimed had been transferred without consideration. After the testimony had been taken, the attorney had an interview with said defendant, during which, as claimed by said defendant, he threatened to prosecute the defendant for perjury unless he would convey the land to the plaintiff. This the defendant refused to do, and a few days later the attorney caused the threatened prosecution to be instituted. Pending an examination, the prosecuting attorney and the attorney for said plaintiff started to drive to the home of said defendant to procure the execution of said deed. Another attorney followed them for the purpose of preventing the execution of the deed. The deed was not executed, and the said defendant thereupon made a complaint against the foreign attorney for maliciously threatening to accuse him of the crime of perjury. After the arrest of the defendant for perjury, one of his creditors, with whom he had deposited his title deed to the land in dispute as security, informed the Michigan attorney of the said arrest, and requested him to investigate the matter. Prior to the visit of the foreign attorney to the defendant to procure said deed, the Michigan attorney had seen the foreign attorney and the prosecuting attorney, and informed the foreign attorney that if he went to the house of the defendant, as proposed, to force him to execute said deed, he would follow him and prevent his doing it. On the trial of the foreign attorney for threatening to accuse the said defendant of perjury, the prosecuting attorney being disqualified from acting, the court appointed the Michigan attorney to prosecute the case. Objection being made to such appointment, the attorney so appointed testified that he was not interested for the complaining witness at the time the prosecution was commenced in any way, but that he had since been retained to defend him in the perjury case. And it is held that said attorney was not disqualified from acting under said appointment under 3 How. Stat. Sec. 557, which provides that no attorney shall be permitted to prosecute or aid in prosecuting any person for an alleged criminal offense where he is engaged or interested in any civil suit or proceeding depending upon the same state of facts against such person, directly or indirectly.
4. Respondent having denied making any demand whatever upon Lucas, testimony tending to show that the latter was in fact guilty of perjury was inadmissible as bearing upon respondent's intent; nor was such testimony admissible for the purpose of impeaching Lucas, or to disprove malice upon the part of respondent.
5. Testimony relative to the arrest of Lucas, at the instance of the respondent, for perjury, and to the attempt to secure the execution of the deed, was admissible as bearing upon the respondent's intent.

Exceptions before judgment from Alpena. (Kelly, J.) Argued June 29, 1894. Decided December 7, 1894.

Respondent was convicted of maliciously threatening to accuse a certain person of the crime of perjury. Conviction affirmed, and record remanded for further proceedings. The facts are stated in the opinion.

W. E. Depew and *J. D. Turnbull*, for respondent.

A. A. Ellis, Attorney General, and *Joseph H. Cobb*, for the people.

MONTGOMERY, J. Respondent was convicted of maliciously threatening to accuse one Paul Lucas of the crime of perjury, in violation of Sec. 9093, 2 How. St. The facts are that the respondent is an attorney, residing at St. Paul, Minn., and was the attorney of one Joseph Stehr, who had a suit pending in the Minnesota courts against Paul Lucas and others, involving the title to certain lands in St. Paul. Respondent came to Alpena in December, 1893, for the purpose of taking testimony of witnesses in the case referred to, and, as subsequent events would indicate, with the further purpose of procuring a deed from Lucas to his

olient. On the 13th, 14th, 15th and 16th of December, respondent examined Paul Lucas as a witness in the case, before a circuit court commissioner. After the testimony was concluded, respondent invited Lucas to his room at the hotel, and while there, Lucas swears, in substance, that respondent threatened to prosecute him for perjury unless he would deed the land to his (respondent's) client, for a named consideration. These threats did not prove effectual, and on the 25th day of January, 1894, respondent made a complaint against Lucas for perjury, and caused his arrest. An examination was not had at once, but Lucas was taken to the office of the prosecuting attorney, who permitted him to go at large, with instructions to report to him (the prosecutor); and, apparently, the prosecutor interested himself in the effort to procure the deed from Lucas and his wife. On the 27th day of January the prosecuting attorney and the respondent in this case and Lucas started to drive from Alpena into the country, where Lucas resided, to procure the execution of the deed. Mr. J. H. Cobb, the attorney who now represents the people in this case, one Charles Golling, and Judge Kelly, who presided at the trial, and the sheriff of Alpena county, followed the party for the purpose of preventing a consummation of the transaction. The deed was not procured, but Lucas returned to Alpena, a justice was called in, and the respondent was complained against for the offense here in controversy. The other facts necessary to an understanding of the case will be stated in connection with the particular questions to which they relate.

1. It is claimed that the information was not properly filed, for the reason that the respondent was never properly held for trial by an examining magistrate; the precise point being that the justice failed to return that he found an offense had been committed, but certified that he found that there was probable cause to believe that an offense had been committed, and that there was probable cause to believe the respondent guilty thereof. It was held in *Turner v. People*, 33 Mich., 368, that it was not necessary for the justice to make such certificate to the circuit court, and that the fact of taking bail imports the decision of the justice, and the fact of giving it imports a recognition of it by the accused. The ruling has been followed in *Cargen v. People*, 39 Mich., 549, and again in *People v. Ten Elshof*, 92, Mich., 167.

It is suggested that the return fairly excluded the idea that the justice found as a fact that the offense had been committed. But the case is in this respect identical with that of *People v. Ten Elshof*, and is ruled by that case.

2. It is next contended that the complaint and warrant set forth no offense. It is claimed that the complaint does not specify the intent, mentioned in the statute, or sufficiently set forth the threats, or specify to whom the threats were made, or state whether the threats were in writing or verbal. The warrant follows the complaint. The complaint was, in substance, as follows: "That the said John J. Whittemore did, on the 16th day of December, 1893, wilfully and maliciously, verbally, threaten to accuse him, the said Paul Lucas, of wilful and corrupt perjury, and did then and there, on the 16th day of December, 1893, at the city of Alpena, county and State aforesaid, threaten to make a criminal complaint for such wilful and corrupt perjury against him, the said Paul Lucas, unless he would sign and execute a certain paper, writing and deed conveying to another the lands and tenements of him, the said Paul Lucas, situate and being in St. Paul, in the state of Minnesota, with the intent

and purpose of procuring the signature of said Paul Lucas against his will to said certain paper, writing and deed, conveying his lands and tenements as aforesaid, with intent to injure and defraud him, the said Paul Lucas, contrary to the form of the statute," etc. We think the complaint does show sufficiently that the threats were verbal.

As to the point that it is not stated to whom the threats were made, the complaint follows the language of the statute in this regard, and while, in the precedents, the name of the party to whom the threats are made is usually set out, we find no case which holds that the omission is fatal to the indictment. An indictment in this form was held good in *State v. Young*, 26 Iowa, 122, although the precise point seems not to have been distinctly made.

We also think the complaint in the present case sufficiently sets out the intent. The statute makes it an offense to make such threats with an intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do an act against his will. The intent to procure the signature of Paul Lucas against his will to a deed of land was an intent to compel Paul Lucas to do an act against his will, to wit, to affix his signature to a deed.

3. The court appointed J. H. Cobb to represent the people on the trial and this is complained of. Mr. Cobb had not acted as attorney for Lucas in any civil proceeding which was pending, so as to be disqualified under the provisions of the statute (section 557). It appeared that Mr. Cobb was attorney for one Robert Rea, who had loaned \$50 to Lucas on his (Lucas) depositing with Rea his title deed to the land in question. After Mr. Lucas' arrest, Mr. Rea said to Mr. Cobb that Lucas had been arrested, and requested Mr. Cobb to investigate it. Mr. Cobb saw Mr. Whittemore and the prosecuting attorney, and told Mr. Whittemore that, if he went into the country to force Lucas to give the deed, he (Cobb) would follow him, and prevent his doing it; and it appears that he did so. He testified in the circuit court that he was not interested for Lucas at the time the prosecution was commenced in any way, but that he had since been retained to defend Lucas in another criminal proceeding. We think it cannot be said that he was employed as attorney in any civil proceeding involving the same state of facts as that involved here. The determination of this case would not in any way affect the criminal prosecution pending against Lucas for perjury.

4. The circuit judge charged the jury, in effect, that if the threats were made with the wrongful intent charged, and were made maliciously, the offense was complete, whether Lucas was or was not guilty of the offense of perjury. The respondent complains of this holding, and contends that if the defendant, having an interest in the matter, believed that the respondent was guilty of perjury, he had the right to threaten to prosecute Lucas, unless he should place the title where it belonged. But we think the law is settled otherwise. 2 Whart. Cr. Law, § 1664; Rosc. Cr. Ev. 979; *Rex v. Gardner*, 1 Car. & P. 479; *Reg. v. Cracknell*, 10 Cox, Cr. Cas., 408; *Com. v. Buckley*, 148 Mass., 27; *Com. v. Coolidge*, 128 Id. Mass., 55; *State v. Goodwin*, 37 La. Ann., 713. The respondent in the present case denied having made the threats imputed to him, or having made any demand upon the prosecuting witness. His statement of the conversation was, in effect, that he offered to compromise the litigation with the complaining witness.

Respondent further contends that the testimony tending to show that Lucas was in fact guilty of perjury was proper for two purposes: "It would tend to show that he was not a truthful witness, and that the threats were not made maliciously." It has been held in some cases that, when the question involved is whether the demand for money is a demand for what respondent is in no way entitled to, evidence that the prosecuting witness has been guilty of an offense for which the accused is entitled to demand compensation is admissible, as bearing upon the question of the intent; that is, to determine whether the accused is seeking to recover his own, or to extort money which does not belong to him. *Com. v. Jones*, 121 Mass., 57; *Mann v. State*, 47 Ohio St., 556. The reasoning of the latter case is against the clear weight of authority, as is apparent from an examination of the cases hereinbefore cited. In the case of *Com. v. Jones*, the fact that a demand was made upon the complaining witness was admitted by the accused, and evidence that the complaining witness had been guilty of a wrong against him, for which he was entitled to demand compensation, was held admissible, as having a bearing upon the question of the defendant's intent, he having denied a threat of prosecution. But in the case of *Com. v. Buckley*, decided by the same court, it was held that evidence that the complaining witness had in fact committed the offense was not competent for the purpose of impeaching him; and it was also said of the other contention made by the respondent here, that it was competent on the question of malice: "The malice required by the statute was not a feeling of ill will towards the person threatened, but the wilful doing of the act with the illegal intent. If the threat was wilfully made with the intent to extort money, it was a malicious act, and the fact that the charge was true would be immaterial." We think there was no error in the ruling in this regard.

5. Respondent's counsel asked an instruction as follows: "If the respondent said to Paul Lucas, 'You come not in my will and give me a deed, I send you and your sister to state prison for life,' this would not constitute a crime." The circuit judge charged the jury, and we think correctly: "It would not be necessary that the precise words should be used; that he [the respondent] would complain of him [the complaining witness], or charge him with the commission of perjury. If he used language which clearly imported that intention—clearly implied and imported that he intended to charge him with false swearing and perjury—it would be sufficient." And further: "It is claimed here by the people that the direct charge was made that if this old man, to state it in his own language, did not come under or within his will, he would send him and his sister to the penitentiary for life. * * * If you find in this case that, in connection with that statement, with that threat, that he had been directing his attention to the fact that he had sworn falsely, or sworn in conflict with other witnesses, you have a right to determine whether it was a threat that he would send him to the penitentiary for life for such discrepancies in his testimony, or not." We think this charge fully justified by the record in the case.

6. Complaint is made of the admission of testimony relative to the subsequent arrest of the prosecuting witness, at the instance of respondent, and to the attempt subsequently to procure the execution of the deed by Lucas. We think this testimony was admissible as bearing upon the respondent's intent.

A careful examination of the record convinces us that there was no legal error committed on the trial. The conviction will be affirmed; and the case remanded for further proceedings.

GRANT, J., did not sit. The other justices concurred. (102 Mich., 519.)

THE PEOPLE v. WILLIAM H. KINDRA.

Criminal law—Indorsing names of witnesses on information—Res gestæ—Liquor traffic—Trial—Argument of prosecutor.

1. Where, in a prosecution for keeping respondent's saloon open after hours, three witnesses testify in behalf of the people that, after the hour for closing, they, in company with three women, whose names are not indorsed on the information, went into a room back of the barroom kept by the respondent, and there purchased lager beer of respondent's barkeeper, it is not error for the court to deny the respondent's motion to place the names of the women upon the information, and produce them as witnesses for the people; it appearing that the prosecution has not failed to put all parts of the transaction before the jury by the testimony of the three men, and that the introduction of the testimony of the women would be merely cumulative.¹
2. After the respondent had rested, one of the women was found, and examined as a witness for the people. Her testimony corroborated that of the three men, but was taken under respondent's objection that it was more prejudicial to him than it would have been had it been taken earlier in the trial. And it is held that the time of calling the witness was within the discretion of the court, and, inasmuch as the respondent was given the right to rebut the testimony, he cannot now complain.
3. After one of the witnesses for the people had been examined in chief, and cross-examined at some length, the court inquired of the prosecuting attorney if that was all of the witness, and that officer responded that he "was through with the witness some time ago," whereupon respondent's counsel stated that he desired to examine the witness. The court declined to wait for such examination, and dismissed the witness from the stand, and counsel for respondent took an exception to this proceeding, but did not advise the court what further questions he desired to ask of the witness. And it is held that, while the court should not have thus summarily dismissed the witness from the stand, yet it was the duty of the counsel for respondent, under the circumstances, to state to the court some reason why he desired to examine the witness further; that no reason is here assigned, and the court are unadvised as to whether the respondent's rights are prejudiced by the action taken; and that, under the circumstances, they are unable to say that there was any prejudice, as the facts brought out on the direct examination seem to have been fully covered by cross-examination.
4. Where, in a prosecution for keeping a saloon open after hours, the respondent was called as a witness in his own behalf, and testified that he had once been convicted of a like offense, his case cannot be said to have been prejudiced by the remark of the prosecuting attorney in his closing argument to the jury, that the case followed another case, in which the respondent pleaded guilty.²

Exceptions before judgment from the superior court of Grand Rapids. (Burlingame, J.) Argued June 29, 1894. Decided December 25, 1894.

¹ See, as to indorsement of names of witnesses on information, *People v. Machen*, 101 Mich., 401, and note; and as to duty of the prosecuting attorney to produce the testimony of *res gestæ* witnesses, *People v. Germaine*, Id., 488, and note.

² The prosecuting attorney states in his brief that "the language used was not apparently strictly borne out by the record, but evidently referred to the statement of the respondent that he had been convicted for keeping open after hours;" and adds that "it would not have been improper to comment on this testimony as affecting the credibility of the witness, and as to that it would make very little difference whether it was a conviction or a plea of guilty."

Respondent was convicted of keeping his saloon open after hours. Conviction affirmed. The facts are stated in the opinion.

Griffin, McDonald & La Grou, for respondent.

A. A. Ellis, Attorney General, and *Alfred Wolcott*, prosecuting attorney, for the people.

LONG, J. The respondent was arrested and tried before the superior court of Grand Rapids for keeping his saloon open on the night of August 24, 1893. At the time in question, the respondent was running an hotel and saloon in the city of Grand Rapids; and, on the evening of that day, a dance was in progress in the hall upstairs in the same building. The dance was concluded about 11 o'clock. On the part of the prosecution, it is claimed that, after the dance, the witnesses Stoutjesdyk, Price, and Rittenberg, together with Lou Thayer and her sister and one May Wyman and several others, came down from the dance hall, and got some beer in the small room back of the main barroom, which beer was paid for by Stoutjesdyk. The people, after swearing the witnesses Stoutjesdyk, Price and Rittenberg, rested their case. These witnesses had testified that, after 11 o'clock, they, in company with these women, went into the room back of the barroom kept by respondent, and there purchased lager of respondent's barkeeper. The names of the women were not placed on the information. Respondent thereupon insisted upon their being produced as witnesses by the people, and that their names be placed upon the information. The court declined to order the people to place their names upon the information, but had subpoenas issued for them. The witnesses not being found, after waiting two hours, the court directed the respondent to proceed with his defense. He did proceed, and examined eight witnesses, who all testified that the saloon was not open upon the night in question, and that no liquors were sold there that night after the hour of closing. After the defense rested, the witness, May Wyman, whom the defense had insisted should be produced by the people, was found, and called into court, and examined on the part of the people. Her testimony corroborated the people's witnesses, but was taken under defendant's objection, who now claims that her testimony was more prejudicial to the respondent than it would have been had it been taken earlier in the trial.

We think the court was not in error in denying the motion to place the names of these witnesses upon the information. It is evident that the people had not failed to put all parts of the transaction before the jury by the testimony of the three witnesses called to sustain the prosecution; that the introduction of the testimony of the other witnesses would have been merely cumulative. It is true that the prosecutor in a criminal case is not at liberty, like the plaintiff in a civil case, to select out a part of an entire transaction which makes against the respondent, and then put the respondent to the proof of the other part, so long as it appears at all probable from the evidence that there may be any other part of the transaction undisclosed, especially if it appear to the court that the evidence of the other portion is attainable. If the facts stated by the witnesses who are called show *prima facie* or even probable reason for believing that there are other parts of the transaction to which they have not testified, and which are likely to be known to other witnesses present at the

transaction, then such other witnesses should be called by the prosecution, if attainable. *Hurd v. People*, 25 Mich., 415. But the rule laid down in such cases is really aimed at the suppression of evidence, and does not decide that in all cases all the witnesses to a transaction must necessarily be called by the prosecution. The justice of requiring this must depend upon circumstances, and it would seldom be as manifest in cases of mere misdemeanor as in cases of higher offenses, especially those accomplished by violence. But in this case there was no reason to suppose that the prosecution had failed to put all parts of the transaction in evidence before the jury, and the testimony of the others who were not called could only have been cumulative. This rule was laid down in *Bonker v. People*, 37 Mich., 4. In *People v. Quick*, 51 Mich., 547, it was held that the prosecution in a criminal case was not obliged to call all the witnesses named on the information. But in the present case the good faith of this claim may well be questioned; for, when one of these witnesses was subsequently called, sworn, and examined by the people, the defense objected to the testimony (such testimony corroborating the people's case), for the reason that the witness was called at a later stage of the proceeding. The time of calling the witness was within the discretion of the trial court, and, inasmuch as respondent was given the right to rebut this testimony, we think he cannot now complain.

One of the witnesses for the people was called, examined in chief, and at some length cross-examined by respondent's counsel. The court then asked of the prosecution, "Is that all of this witness?" and attorney for prosecution responded, "I was through with the witness some time ago." Respondent's counsel then said, "I desire to examine this witness;" when the court stated, "I cannot wait," and dismissed the witness from the stand, counsel for respondent taking an exception to this proceeding. It is not stated in this record what further examination the respondent desired to make of this witness, and the court below was not advised what further questions respondent desired to ask; but the whole matter was dropped, as appears by this record, by respondent's counsel taking an exception. We think, if respondent desired further examination of the witness, he should then have stated to the court upon what subject he desired to examine him, for he had already cross-examined the witness at great length. While the court should not have summarily dismissed the witness from the stand, yet we think it was the duty of counsel, under the circumstances, to state to the court some reason why he desired to examine the witness further. No reason is assigned in this court why further examination is desired, and we are left wholly in the dark as to whether defendants' rights were prejudiced by the action taken. Under the circumstances, we are unable to say that there was any prejudice, as the facts brought out on the direct examination seem to have been fully covered by cross-examination.

Complaint is made of the remarks of the prosecuting attorney during the trial. He stated, in the presence of the jury, in the closing argument: "This case follows another case in which respondent pleaded guilty." We do not think this remark prejudiced respondent's case. He was called as a witness, and testified that he had once been convicted for keeping open after hours. Judgment must be affirmed.

MCGRATH, C. J., MONTGOMERY and HOOKER, JJ., concurred. GRANT, J., did not sit. (102 Mich., 147.)

THE PEOPLE v. WILLIAM BERRY AND JOSEPH RICE.

Error to Hillsdale. Violation of local option law. Reversed and new trial granted December 28, 1894. Case now pending.

PEOPLE v. KETCHUM.

(Supreme Court of Michigan. January 4, 1895.)

Obscene photographs—Sitting for negative—Evidence of purpose.

One cannot be convicted under an information charging her with having procured a certain obscene picture of herself for the purpose of exhibition, loan, and circulation, upon evidence tending to show merely that she sat for such a negative, there being nothing to show her purpose in doing so.

Exceptions from circuit court, Ingham county; Rollin H. Person, judge.

Catherine J. Ketchum was convicted of having procured an obscene picture of herself for the purpose of exhibition, loan and circulation, and excepts. Reversed.

A. A. Ellis, Attorney General, and L. B. Gardner, prosecuting attorney, for the people. William A. Fraser and Jason E. Nichols, for defendant.

HOOVER, J. Defendant was convicted under an information which charged her with having procured a certain obscene picture of herself for the purpose of exhibition, loan, and circulation. Counsel for the people claim that the evidence shows that the defendant employed two itinerant photographers to make negatives of her residence; that subsequently these negatives were found among the effects of said photographers, and that Exhibit A was also found at the same time and place. Exhibit A was a negative of a woman in a practically nude condition, and is claimed to be a negative of the person of the defendant. Exhibit B was a photograph made from this negative by direction of the prosecuting attorney or sheriff. A witness named Cole testified that he saw a picture identically like Exhibit B in Mohr's cigar store. There was no evidence that any photograph was made from the negative, except that made by the officer's direction, unless the picture described by Cole was such. There was testimony tending to show that the photographers did some work upon nude fancy pictures for Mohr's saloon. The court instructed the jury, in substance, that the negative is a picture, within the meaning of the law; that if the defendant voluntarily sat in a nude condition, to enable it to be taken, she assisted in obtaining it, and therefore procured it; and that an intention to circulate photographic prints from the negative would be an

intention to circulate the picture within the statute. He left the question of the intent with which it was procured to the jury. We have no doubt that a negative is a picture. We think also that the court was right in holding that sitting for the negative was procuring the negative. The purpose for which the picture was obtained is an essential element of the defense, and must be proved like any other element. There can be no presumption of a particular purpose; it must be a legitimate inference from the evidence. The facts that Wigle & Webb had the negative, and that Cole saw a picture printed from it, do not sufficiently prove it. The natural inference from these facts would be that she sat for a negative to obtain a picture or pictures for herself. While it may be admitted that the usual purpose of procuring photographs is exhibition to friends, it does not necessarily follow that such is the purpose. Nor is there any reason for thinking that she designed that Wigle & Webb should dispose of any to other persons. The purpose does not appear, unless from the fact that one was seen, or from the assumption that she expected or designed to give prints to her friends. There is nothing to show either. If there were testimony tending to show that she did exhibit or circulate the picture, we might legitimately infer that she intended, when she procured it, to make such use of it. But in this case she is not shown to have done more than to sit for a negative, and that only appears from the fact that the negative was found in the possession of the photographers, with whom she had done business in relation to other pictures. Upon this record the court should have directed a verdict of not guilty. Conviction set aside, and a new trial ordered. The other justices concurred. (61 N. W. Rep., 776.)

PEOPLE v. TAUGHER.

(Supreme Court of Michigan. December 7, 1894.)

Larceny—What constitutes.

Defendant's buggy was destroyed by an electric car, and the superintendent of the car company procured a buggy belonging to a third person for defendant to use. The owner of the buggy subsequently demanded the buggy of defendant, who promised to return it, but afterwards concealed it. *Held*, that defendant, having acquired possession lawfully, was not guilty of larceny.

Error to circuit court. Muskegon county; Albert Dickerman. judge.

James Taugher was convicted of larceny, and brings error. Reversed.

The respondent was convicted, under a common law information, of the larceny of a buggy. The entire evidence upon which he was convicted is stated in the record as follows: "That on the 19th day of July, 1893, Mrs. Taugher, wife of the defendant, came to the city of Muskegon with a horse and buggy, and while in said city her buggy was smashed by an electric car, and that Fred W. Thompson, superintendent of the electric railway, procured of Peter Damm, complaining witness in this cause, a buggy for the use of Mrs. Taugher, to enable her to return to her home—the buggy to be returned by her on the following day. That Mrs. Taugher

did not return the buggy. That afterwards, and on the 25th day of July, 1893, Mrs. Taugher and defendant, James Taugher, came together to said city of Muskegon with said buggy, and were met on one of the streets of said city by said Thompson and said Peter Damm. That Thompson said to Damm: 'Here is your buggy. Now, take it, and I will pay for one day, and they must pay for the rest.' That at this time defendant was in the buggy, and his wife on the sidewalk, close to the buggy. That Peter Damm then laid his hand on one of the thills of the buggy, and said, 'This is my buggy, and I want it right here, now.' That then Mrs. Taugher said to Thompson, 'When are you going to fix my buggy?' Thompson replied: 'I have nothing to do with it. You must see Mr. Nims, the president of the company, about it.' That defendant did not leave the buggy, and that Damm made no further effort to obtain the buggy. That defendant said, 'Let me have the buggy to take my wife to Nims' office, and I will return it on my way back,' to which Peter Damm consented, and released his hand from the thill of the buggy. That this conversation occurred about eleven o'clock in the forenoon. That Taugher and wife went to Nims' office, and were seen there, and in the street in front of the office, by Peter Damm, and that defendant remarked to Damm, 'We are waiting for Mr. Nims.' That the buggy was not returned to Damm, but was driven by Taugher and wife out to their farm, about four miles from the city of Muskegon; the said farm being the home of defendant, and the place where Mrs. Taugher wanted to go on the day of the accident to her buggy. The next day, Damm drove out to the farm, saw Taugher, and told him that he had come for the buggy. Taugher told him that his wife was out picking berries, and had the buggy with her. Taugher also said he had two horses, a colt and an older one. That Taugher then had one horse hitched to a cultivator, and a colt was seen by Damm running in a pasture on the farm. Taugher also told Damm that his wife would not give up the buggy until her own was fixed, and told Damm that he should go to the street car company for his buggy, to which Damm replied: 'You want me to have a lawsuit to accommodate you?' and Taugher said, 'I guess you will have to.' That Damm then searched Taugher's premises, but did not find the buggy. That Damm then returned to the city, and caused the arrest of Taugher for the larceny of a buggy. That, at the time of Taugher's arrest at the farm, Taugher told the officer that he (Taugher) never stole a buggy; that his wife went to town, and met with an accident, and that she got the buggy from Thompson, and still had it in her possession; that he (Taugher) had nothing to do with it whatever; and that the buggy was then in the barn. That at the time of defendant's arrest the officer did not search the barn or premises of Taugher, but brought defendant to the city of Muskegon, and the next day went again to Taugher's premises with Damm, and searched the farm, but did not find the buggy. That on the same day, and after his return to the city of Muskegon, the officer went to the jail where defendant was confined, and asked him where the buggy was. That defendant said in response that the buggy was up in the barn. That the officer then said to defendant: 'You know better. It was not there yesterday, and it is not there to day.' That Taugher inquired if the officer had been up to the farm, and was told, 'yes.' That the officer further testified under objection of defendant's counsel as to competency of same, which objection was overruled and exception taken. That the officer then told defendant that he had made inquiries of Mrs.

Taughner, and that she told him the buggy was not there today, and was not there yesterday. That defendant thereupon told the officer that it was no use to pick him, as he would get nothing out of him. That defendant also told the officer 'that maybe some friends of mine in town may have the buggy.' That the officer asked for their names, and was told by Taughner that he would not give their names; that he would not put anybody in trouble." The respondent introduced no evidence.

Jerome E. Turner, for appellant. *A. A. Ellis*, Attorney General, and *Charles B. Cross*, for the people.

(GRANT, J. (after stating the facts). It is contended by the attorney for the people that the respondent intended to steal the buggy from the outset, and that he requested and obtained the consent of Mr. Damm to use the buggy temporarily with felonious intent. We do not think that a felonious taking is established by the proof. He was in the lawful possession of the buggy when Damm approached him upon the street and demanded possession. Damm, by placing his hand upon the thill, did not recover possession. The people rely upon the case of *People v. Camp*, 56 Mich., 548, 23 N. W., 216. In that case the respondent obtained possession of a horse from a boy, the son of the owner, who evidently had no authority to act for his father, and afterwards secreted him. A felonious taking is essential to establish the crime of larceny at the common law. Respondent's possession was lawful until the demand. He would be liable in a civil action of replevin or trover, but no criminal intent is shown. It follows that the conviction must be set aside, and the respondent discharged. The other justices concurred. (61 N. W. Rep., 66.)

PEOPLE v. FUHRMAN et al.

(Supreme Court of Michigan. January 22, 1895.)

Criminal law—Change of venue—Correction of jury list—Separate trials—Prosecuting attorney—Homicide—Instructions.

1. In a criminal case the court may grant a change of venue at the request of the State. *People v. Peterson*, 52 N. W., 1039, 93 Mich., 27, followed.
2. Where the jury list contains an excessive number of jurors from any township the court may correct the list by striking off all names above the number to which the township is entitled. *Hewitt v. Circuit Judge*, 39, N. W., 56, 71 Mich., 287, 296, followed.
3. 2 How. St. § 7554, providing by whom the jury list shall be made, does not render invalid a list drawn in accordance with a city charter which provides that the list shall be made by different officers.
4. The court may, in its discretion, at the request of the State, grant separate trials to persons jointly indicted.
5. The fact that a prosecuting attorney of one county had been employed by the authorities to prosecute a criminal case in another county does not, on removal of the case to his county, raise a presumption that he was still to receive a reward for the prosecution of the case, so as to thereby disqualify him.
6. It is not error to instruct that, if defendant is guilty at all, he is guilty of murder in the first degree, where there is no evidence on which a verdict for any less grade could rest.

7. Where the court repeatedly charged that the burden was on the people to prove defendant's guilt beyond a reasonable doubt, and that the people should establish every requisite beyond a reasonable doubt, and as to the presumption of innocence, a misleading charge as to the burden on the defense of an alibi is not ground for reversal.

Error to circuit court, Alpena county; Robert J. Kelley, judge.

August Fuhrman and others were convicted of murder, and bring error. Affirmed.

A. A. Ellis, Attorney General, and James McNamara, prosecuting attorney, for the people. James D. Turnbull, for defendants.

MCGRATH, C. J. Defendants were convicted of murder. The venue was changed at the instance of the people from Presque Isle county to Alpena county, and error is assigned upon the order of removal. The point is ruled by *People v. Peterson*, 93 Mich. 27, 52 N. W., 1039.

Upon defendants' challenge to the array of jurors upon the ground that an excessive number of jurors had been returned from certain townships the court ordered the clerk to reduce the list by striking off all names below the number appearing thereon to which each township was entitled, directed the supervisors and aldermen of the several wards of the city of Alpena to forthwith make return of a list of persons qualified to serve as jurors, and afterwards ordered a drawing from the list so returned. Defendants then made a second challenge to the array, alleging: "(1) That the court had no authority to direct the striking off of the said names from the lists returned from said townships, etc.; (2) that the court had no power to order the supervisors and aldermen to make the selection; (3) that the supervisors and aldermen had no power to make said selection; (4) that the court had no authority to order the drawing and summoning of said jury of twenty-four men; (5) that the names so selected and returned from city of Alpena were selected and returned for the very purpose of the trial of this case, and under improper influences and circumstances,' etc. As to the first objection, the course pursued was that suggested in *Hewitt v. Circuit Judge*, 71 Mich., 287, 296, 39 N. W., 56. As to the fifth objection, the order of the court, and what transpired at the time, expressly negative the allegations made. As to the other objections, the statute provides that the supervisor or assessors, as the case may be, and aldermen of each ward or assessment district in any city, shall make a list, etc. 2 How. St. § 7554. The city of Alpena elects a comptroller, who is its assessing officer, and each ward elects two aldermen and one supervisor. The latter exercises the power of supervisors in townships, except as otherwise provided in the act. It is urged that under the charter of the city of Alpena neither the supervisors nor aldermen are assessors or members of the board of review; that the comptroller of the city is the assessing officer, and that the statute (section 7554) contemplates that an assessing officer should assist in making the list. Section 7555 would seem to indicate that the lists are to be made by officers having some knowledge of the persons whose names are listed. The supervisor or assessor and aldermen of each ward are named, the contemplation being that the listing shall be done by local officers. In *Hewitt v. Circuit Judge*, *supra*, the charter of the city of East Saginaw created the office of assessor, and required that officer to make and return jury lists, and the

court held that there was nothing compulsory upon the legislature as to how or in what manner lawful jurors' names shall be returned to the box, and that the general law was of no higher or greater authority than any other enactment upon that subject. We think that the proper officers under the statute were designated by the court to return the lists. There is no force in the objection that the court had no power to order the return of the lists. The statute provides that whenever, for any cause, jurors shall not have been drawn or summoned to attend any circuit court, such court may, in its discretion, order a sufficient number to be drawn and summoned, and that the court may direct from which townships or districts such jurors shall be drawn. 2 How. St., § 7578. It was held in *Thomas v. People*, 39 Mich., 309, that the time for returning the lists was of no importance to litigants. Nor is the manner in which the lists are obtained by the clerk important, if procured from the proper source, and through the proper channels. The order of the court recited that by reason of the neglect of the supervisors and aldermen of the several wards of the city of Alpena no names of persons qualified to serve as jurors had been legally returned from that city, and, "there being a large number of civil and criminal cases for trial by jury, it is ordered," etc. Not having, prior to that time, returned the proper lists, the duty was a continuing one, and it was immaterial whether they made the return voluntarily, upon request, or upon the order of the court.

The next contention is that the court erred in directing separate trials. The matter, under the statute, was in the discretion of the trial court. 2 How. St., § 9573; *Stroh v. Hinchman*, 37 Mich., 492.

Objection is made to the participation of the Attorney General and Mr. James McNamara in the prosecution. The Attorney General appeared at the request of the Governor, under the statute (1 How. St., § 286). Mr. McNamara was at the time the prosecuting attorney of Alpena county. Prior to the removal of the cause he had been appointed by the circuit court of Presque Isle county to assist in the prosecution, and the board of supervisors of that county had agreed to pay him a stipulated per diem for such service. After the removal to Alpena, it does not appear whether or not he was to receive any compensation. There is no presumption that he was. The fact of the former employment by Presque Isle county would not disqualify him. The statute is aimed at employment by or receipt of fee or reward from individuals other than the public authorities.

Exception is taken to the court's instruction that "from the evidence in this case, if these defendants are guilty at all, they must be guilty of murder in the first degree. There is no evidence in this case upon which a verdict of murder in the second degree, or in any lesser grade of this crime, could rest." That question has been fully discussed in *People v. Repke* (Mich.; filed Jan. 4, 1895) 61 N. W., 861.

Error is assigned upon the following instructions: "Now, gentlemen, the respondents here bring forward the defense which is termed in the law an 'alibi.' It means that when a person is charged with a crime he comes forward and claims and attempts to establish the fact that he was somewhere else at the time of the commission of the crime, some other place than that where the crime was committed; that is what 'alibi' means; and that is one of the defenses that these parties here have brought forward, and insist upon. I say to you, gentlemen, it is a perfectly legal and legitimate defense, and there is nothing discreditable, and there is nothing in the fact that they attempt to prove this defense of an

alibi, that should mitigate against them. If it is established, it is a complete defense; and they have attempted in their defense to establish the fact that they were not present on the night in question, at the time and place of the killing of Albert Molitor. And in truth it would require no illustration to satisfy your minds that, if they were not there, if they were miles away, without knowledge of its commission, that they would not be guilty." There is no doubt but that, if this charge stood alone, or was so separated from the other portions of the charge as to impress the jury with the idea that this defense was to be treated and considered separately, the burden was upon the defendants to establish the alibi, and, if not so established to their satisfaction, it could not be considered, it would be erroneous. Before giving the instruction complained of, the court, however, had repeatedly instructed the jury as to the burden of proof and the presumption of innocence; that the burden was upon the people; that the people "should establish every requisite by evidence which removes from your mind every reasonable doubt;" that "parties charged with crime, and brought to the bar of this court to be tried, are not required to vindicate or establish their innocence. They have a right to stand mute. Under the law of the land they have a right to say to the people 'You must establish our guilt,' and that is the law in this case. The people assume the burden of establishing the guilt of these defendants to your satisfaction beyond a reasonable doubt. * * * That the defendants in this case, standing here, charged as they are by the people with the commission of this crime, are entitled to what the law defines to be the presumption of innocence. These defendants are entitled to that presumption. They start out in this case surrounded with that presumption. It is one of the safeguards that the law has thrown around the accused persons; and the burden of proof is on the people or the state to show the guilt of the accused beyond a reasonable doubt. I instruct you, in this case, that the law presumes these defendants to be innocent of the crime charged until that presumption is overcome by evidence which satisfies and convinces your minds of their guilt, or of the guilt of one or more of them, beyond a reasonable doubt. In other words, this presumption accompanies these defendants through and at every step in this case, and applies to every essential requisite of the crime of murder. And this presumption of innocence must be so absolutely and conclusively overcome by the people's evidence that there remains in your minds no reasonable doubt of their guilt. You must be able to say in your careful deliberations, and in the weighing of the evidence, that there is no rational theory on which the evidence can be reconciled but that of the defendants' guilt." After giving the request objected to, the court said to the jury: "As I have said to you before, gentlemen, you will not be warranted in convicting these defendants unless the evidence in this case convinces your minds of their guilt beyond a reasonable doubt, as I have defined it." Again, at the close of the charge, the court said: "If they are guilty of this crime under the evidence in this case, and you honestly believe it from the evidence to that extent that there is no reasonable doubt remaining in your minds, you can only answer and fulfill the high position that you now occupy by declaring your verdict in accordance with your belief. * * * It is your duty, however, should the evidence in this case fail to convince your minds to the extent that I have instructed you, should it fail to satisfy your minds beyond a reasonable doubt; it is your duty — no matter what may be the impressions or the desires of anybody—it is your duty to

declare their innocence. They are not to vindicate or prove their innocence. The people must establish it, and to that degree which I have named; and if they have not you ought equally as fearlessly say to these defendants that they are not guilty." The jury could not have been misled, taking the charge as a whole.

Some questions are raised as to the admissibility of testimony, upon examination of which we find no prejudicial error. The judgment is affirmed. The other justices concurred. (61 N. W. Rep., 865.)

PEOPLE v. GROSSMAN.

(Supreme Court of Michigan. January 22, 1895.)

Error to circuit court, Alpena county; Robert J. Kelley, judge.

August Grossman was convicted of murder, and brings error. Affirmed.

James D. Turnbull, for appellant. *A. A. Ellis*, Attorney General, and *James McNamara*, prosecuting attorney, for the people.

MCGRATH, C. J. This case is ruled by *People v. Fuhrman*, 61 N. W., 865, immediately preceding above entitled case. Respondent here was charged jointly with the parties in that case, but had a separate trial. The questions raised are the same. The judgment is affirmed. The other justices concurred.

PEOPLE v. REPKE.

(Supreme Court of Michigan. January 4, 1895.)

Murder—Defenses—Instructions—Principal.

1. It is not error to instruct that defendant, if guilty at all, is guilty of murder in the first degree, when there is no evidence on which a lower degree of crime can rest.
2. A threat to take one's life, unless the person threatened assist in the perpetration of a murder, made three days before the murder was committed, is no defense to a prosecution therefor.
3. A person present at the commission of a murder, and aiding, either by keeping guard, or by counseling or encouraging the commission of the crime, is equally guilty with the person who delivers the mortal blow.

Error to circuit court, Alpena county; Robert J. Kelley, judge.

William Repke was convicted of murder, and brings error. Affirmed.

James D. Turnbull, for appellant, *A. A. Ellis*, Attorney General, and *James McNamara*, prosecuting attorney, for the people.

LONG, J. Respondent was convicted in the Alpena circuit of the crime of murder in the first degree, and sentenced to imprisonment in the State prison for life. It appears from the uncontradicted evidence that on

August 23, 1875, twelve persons, among whom was respondent, met at a place known as "Reinke's Hill," about four and one-half miles from Rogers City, in Presque Isle county; and after talking over the subject of the meeting, and taking an oath to keep secret what should take place, they went together to Rogers City, arriving there in the evening, and shot through the window and killed Albert Molitor, while he was engaged in his business in the office connected with his store. The undisputed evidence shows that it was the understanding before they left Reinke's Hill that they should go and kill Molitor. That was their business to Rogers City that night. The evidence as to the murder, the manner of killing, and the circumstances surrounding the same were uncontradicted.

The respondent himself took the stand, and testified that he was present, and saw Molitor shot, and that he was shot through the window on the night in question by some of the party with whom the respondent visited Rogers City, but that he did not do the shooting himself. A number of the persons who were present and assisted more or less in the murder testified that the respondent was one of the ring leaders in the conspiracy to take the life of Molitor. Stephen Reiger testified that respondent came to him, and got him to join the enterprise, on the theory that they were going to kill a bear; and that he was not acquainted with the facts or object of the meeting until he had actually arrived at the hill on the evening the murder was committed. Frederick Sorgenfreid testified that respondent went through the township and got the men to meet at the hill. Ferdinand Bruder testified that respondent came to his house on the day they met at the hill, and told him, if he did not go, he would be killed. The respondent testified that, when near Rogers City, Barabas, one of the party, went forward to see if he could kill Molitor alone; that they heard a shot, and then there was some talk about going, but Grossman said they would have to stay, because maybe they had got Barabas, and, if so, they would have to go and get him free that Barabas came back, and, having fired off his gun while he was gone, had to reload it there, in the presence of respondent and the others. Respondent then says: "He load his gun, and then we go along, and as we come along he tell us Molitor was there in the office, and we go right around on the office window. Where every man is going from that time I can't say. Them four men, Jacobs, Barabas, Fuhrmann, and Grossman, go right from the window close to the corner of the window, and stand up on the window right short. I was standing there by the telegraph poles and fence posts, and all kinds of wood laying there. * * * Then, at once, Molitor came out of little room, out of other little room, and had a big book on his hand, on his arm. And, so as he come out of that little room out, them four men raised up his gun onto the window, and Molitor go with the book, and lay the table, and, so as he put the book on this table, that moment he shooting. Just the moment he lay the book down, that minute Molitor fall down. Molitor holler up, 'Oh, God!' I turned around and ran away." The evidence shows that Molitor was shot with several buckshot, coming from different angles in his side and back, having been sitting or standing with his side to the window when the guns were discharged. A young man, by name of Sullivan, a clerk in Molitor's employ, was shot at the same time, and, some of the witnesses testify, by the respondent. The theory of the people was that respondent was one of the willing participants in this murder. The respondent, on the other hand, contended that he assisted in the killing of Molitor, or went with

the party, for the purpose of protecting himself, so that he might afterwards be unmolested, or, as claimed by his counsel, because he was compelled by threats to go. Respondent testified as to the threats, substantially, that the first his attention was called to the killing of Molitor was some three days before the crime was committed. He says that Banks came to him, and told him that Hoeft and Molitor were having a lawsuit; that, if Molitor lived, he would beat Hoeft, and in such case all the farmers would have to run away; that Molitor should be shot. In answer to this he says he told Banks: "I can't go along with you to shoot a man. Mine heart can't do that to shoot a dog. I got a bad dog. I got to ask mine neighbor to come and shoot him. I can't do it myself." To this Banks replied that they had four men to do the shooting, and that twelve men would make a jury, and what "twelve men do everybody got to follow." Respondent replied, "I got no gun;" and Banks said: "I furnish you some things for that time, and you got to go. I told you about that now; you got to come." Respondent said he did not like to go when Banks answered: "Well you got to go if you like to live. If you back out, if you don't come maybe we shoot you on the same night and you been shot the first night if we can get you." Respondent says that at the time Banks told him to come to the hill on the third night following he saked who would be there and Banks said: "You don't need to know that. You come on that place where I tell you. You will find all the man come together there and you will find out who is there." He says, further, that after Banks went away, he went into the house and told his wife what Banks had said. She cried and he told her he would not go. But she said: "Well maybe you could go, and you do nothing and nobody could do you nothing." And he said he would go to the hill, and find out who would go. He joined the party, made no protest, took the revolver furnished him, and went with them. He drank with the rest on the way down. He says that, when Banks gave him the revolver, he told him it would come handy when he went into the store to fight. It also appears from the respondent's testimony that, some time after the murder, Hoeft gave him \$100 not to go away out of the country, as Hoeft was afraid that he (respondent) would talk about it. He was asked if Banks told him that Molitor and Hoeft had a lawsuit. "A. Yes. Q. And, if Molitor lived, he would win the case? A. Yes. Q. And you wanted to kill him so that he could not testify in the case? A. That is what he told me. Q. That is the way you understood it? A. Yes. Q. Really what you were down there for to kill Molitor to help those folks, to help Hoeft out? A. Yes. Q. You went along to protect them, to keep them if they went in, anybody jumped onto them, get them clear? A. Yes. Q. That is what you agreed to do? That is what you went for? A. Yes." He was then asked: "Mr. Repke, what made you go that night with those people down to Rogers City to murder Molitor? What forced you to do this? A. I was scared for mine living. If I don't go to kill Molitor, I be killed. Q. You were afraid they would kill you if you didn't do this? A. Yes. Q. Is that the reason you went and took part? A. Yes. Q. You would not have gone if you had not been afraid? A. If I was not afraid, I wound not go. Molitor was my best friend." This is substantially all the testimony bearing upon the questions raised in the case. It appears from this that the threats, if any were made, were made by Banks three days before the murder. No one threatened him at

the hill. No one but Banks told him he must go. Banks was not at the hill, and it is not claimed that Banks was present at the murder. The substance of the threats, as claimed by respondent, was that, three days before the murder, Banks told him that, if he did not go, when they caught him they would kill him.

At the close of the testimony, the respondent's counsel asked the court to instruct the jury, as follows: "First, That in order to find the defendant guilty, in this case, of murder, the jury must find that the defendant, at the time of the transaction and killing, was a free agent. Second, If the jury find that the defendant was coerced into taking part in this transaction, then he is not guilty of murder. Third, In order to convict defendant of murder, the jury must find that defendant either aided, abetted, or counseled the killing of Albert Molitor. Fourth, The fact of defendant going with these other parties that killed Albert Molitor at Rogers City, and meeting with them at Reinke's Hill, or being present at the shooting, is not enough to convict defendant of murder. In order to make defendant guilty of murder, the jury must find that the defendant did certainly aid, abet, or counsel the killing of Albert Molitor, and this must be determined from all the evidence and all the circumstances surrounding this transaction, and the jury must find this beyond reasonable doubt. Fifth, There is no evidence in this case that will warrant the jury in finding that defendant fired the shot that killed Molitor. Therefore the jury must find that the defendant voluntarily accompanied or assisted those who did the killing. Unless the jury find this beyond a reasonable doubt, then they must acquit defendant. Sixth, The jury must find beyond reasonable doubt that defendant voluntarily united himself with those who did the killing in this case, and either aided, abetted, or committed the same. Unless the jury so find, they must acquit the defendant of murder." These requests were refused, except as given in the general charge. Upon the degree of the offense, the court charged: "If respondent is to be convicted at all, he must be convicted of murder in the first degree. There is no evidence in this case which a verdict of murder in the second degree or any lesser grade of crime can rest upon.

* * * If you can reconcile his conduct, his actions, consistent with any theory of innocence, he is entitled to the benefit of such theory and it is your duty to give him the benefit of the reasonable doubt." The court also gave the jury the definition of "murder," and the degrees into which the statute divides it, and what would constitute murder in the first degree under the statute, and directed them that, "before you can convict this respondent of murder in the first degree, it is necessary that the people should have convinced your minds that respondent, on the night in question, either inflicted the mortal wound, or that he was present, aiding, assisting, or in some manner abetting the commission of this offense; and the burden is upon the people to convince your minds that he was there, participating and assisting in the crime." The jury were also directed fairly upon the question of reasonable doubt, and, if there existed such a doubt, they must acquit. Upon the question of respondent's being coerced into going, the court charged the jury as follows: "The law will not excuse a criminal act because committed under the influence of fear, unless it clearly appears that such fear was founded upon some reasonable ground. No duress will excuse from punishment, unless it be an actual compulsion by the use of force. The duress of compulsion must consist in such force exercised towards the person as

puts him in present fear of death or great bodily harm. Threats of future injury will not excuse. A threat to take one's life at some future time, unless the person so threatened commit or aid in the commission of the felony, is quite insufficient to excuse the commission of a felony by the person so threatened. * * * No man, from fear of some future consequences to himself, has the right to make himself a party to the commission of the crime of murder: and I charge you in this case, gentlemen, that, under the testimony of Repke and the evidence in this case, no such state of facts exists as to coercion or duress used as would justify Mr. Repke in participating in the commission of this crime. A mere threat that, if he did not go at a future time and aid in the commission of the murder there, he would be killed, would not be sufficient." The jury returned a verdict of guilty of murder in the first degree.

1. It is contended that the court was in error in directing the jury that if they found respondent guilty, it must be of murder in the first degree. Section 9075, How. Ann. St., provides: "All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary shall be deemed murder of the first degree," etc. Section 9076 provides: "All other kinds of murder shall be deemed murder in the second degree," etc. Section 9077 provides: "The jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly." Section 9428 provides: "Upon an indictment for any offense consisting of different degrees as prescribed in this title, the jury may find the accused not guilty of the offense in the degree charged in the indictment, and may find such accused person guilty of any degree of such offense inferior to that charged in the indictment, or of an attempt to commit such offense. Section 28, article 6, of the constitution provides that "in every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury, etc. The contention is that, under these provisions of the statute and constitution, it was the exclusive right of the jury to determine the degree of the murder, and that, by the instruction given to them, the court determined the degree; and, if the court had this right, then, if the jury failed to find the degree in their verdict, the court would have the right to fix it. We quite agree with counsel that it was the duty of the jury to find the degree of the murder in their verdict. It was said in *Tully v. People*, 6 Mich., 273: "The statute (Comp. Laws, § 5713) is imperative that the jury in their verdict, or the court on plea of guilty, shall determine the degree of the crime. The verdict rendered in that case simply found the respondent guilty in manner and form as charged in the information. The court sentenced respondent to imprisonment for life, and the case was reversed in this court for the above reason. And in *People v. Hall*, 48 Mich., 482, 12 N. W., 665, the information merely charged murder without charging in what way it was committed, or in what degree, and it was said that, "under the statute the jury must find the degree of the offense, and it cannot be treated as murder in the first degree unless expressly so found. In *People v. Potter*, 5 Mich., 8, it was

said: "The duty of ascertaining the degree of the crime is peremptorily imposed upon the jury."

But in the present case, under the proofs, if the respondent was guilty at all, it was of murder of the first degree, as it was committed by lying in wait, and by a preconceived plan to wilfully and deliberately take life. There is no dispute about it. There is no contention that it was accidental, or that it was committed in self defense. There is no fact or circumstance that would reduce it below the first degree. The murder was committed; the respondent testified to it himself; and it was committed in the manner and form pointed out by the statute as constituting murder in the first degree. As was said in *People v. Hall, supra*: "Murder by poison, under the statute, is always murder in the first degree, and the jury should have so charged." The error in that case was that the jury were not so charged, but were left by the charge to find the degree, and did not find it in the first degree; but the court treated it as murder in the first degree, not only by so naming it, but also by inflicting the statutory punishment for that crime. Under this same provision of the statute, murder by lying in wait is murder in the first degree, and it was the duty of the court to so charge. It was not the province of the jury to find a different degree of the offense under the facts shown, as it would have been a clear violation of this statute. In criminal as well as in civil cases it is the duty of the court to instruct the jury upon the law, and it is the duty of the jury to accept the ruling, and be guided by it. *Hamilton v. People*, 29 Mich., 173; *People v. Mortimer*, 48 Mich., 37, 11 N. W., 776. But, as was said in the last case: "It is, no doubt, in their power to disregard evidence, and to acquit persons whom they know to be guilty." The court in the present case did recognize this power, and expressly told the jury that they could acquit, but, if they found the respondent guilty at all, it must be for murder in the first degree. There was no question but that the murder was committed by lying in wait, and there is no question, under this statute, but that murder committed in this way is murder in the first degree. The court said in *People v. Murray*, 72 Mich., 16, 40 N. W. 29: "Without any request from counsel, it is the duty of the circuit judge to see to it that the case goes to the jury in a clear, intelligent manner, so that they may have a clear and correct understanding of what it is their duty to decide, and he should state to them fully the law applicable to the facts; especially is this his duty in a criminal case." In *Baker v. People*, 40 Mich., 411, the court charged the jury that the verdict should be either murder in the first degree, or not guilty. It was said by this court: "There is no claim or pretense that the murder, if committed, was perpetrated by means of poison or lying in wait. If there had, perhaps the charge given might have been proper. There were facts from which the jury might have found that it was wilful, premeditated killing; but his was a question for them to determine from the evidence in the case. It may have been a sudden affray, or in self defense, that the fatal blow was struck; and, although the court may have been of the opinion that such was not the case yet it still remained a question for the jury to determine under all the facts and they certainly may have found that the crime committed was not in the same degree as the court assumed." The Iowa statute is substantially like our own. It divides murder into two degrees, and provides that all murder which is perpetrated by means of poison or lying in wait, etc., is

murder of the first degree. In *State v. Johnson*, 8 Iowa, 525, the trial court directed the jury as to the form of their verdict as follows: "'We, the jury, find the defendant guilty of murder in the first degree;' or, if you find the defendant not guilty, you will say: 'We find the defendant not guilty.'" This was held not to be error. In *Clark v. Com.*, 123 Pa. St., 555, 16 Atl., 795, it was held that when no controversy was made upon the evidence that the murder was perpetrated by lying in wait and to accomplish a robbery, it was no error to omit to instruct upon the law of voluntary manslaughter, and upon the power of the jury to find such verdict in the cause. The Pennsylvania statute is similar to our own. In *People v. Wright*, 93 Cal., 564, 29 Pac., 240, it was held that an instruction that the defendant must be either convicted of the offense charged or acquitted is proper, when there is no evidence of any lesser offense, and that he was guilty of that charge or not at all. The offense charged in that case was mayhem. A similar holding was made in the same court in the case of *People v. Barry*, 90 Cal., 41, 27 Pac., 62, which was on the charge of robbery and also in the case of *People v. Madden*, 76 Cal., 521, 18 Pac., 402, which was an assault to commit the crime of murder. See, also, the following cases, holding that this rule applies to trials for homicide: *State v. Turlington*, 102 Mo., 624, 15 S. W., 141; *O'Brien v. Com.*, (Ky.) 12 S. W., 471; *Jones v. State*, 52 Ark., 345, 12 S. W., 704; *State v. Munchrath*, 78 Iowa, 268, 43 N. W., 211; *McCoy v. State*, 27 Tex., App. 415, 11 S. W., 454.

The verdict of the jury in the present case is in form that of murder in the first degree and the fact that the court directed that they must so find, or acquit the respondent, was proper under the evidence. Any other instruction than this, under the facts and circumstances shown, would have been very improper, as there was no evidence warranting a different direction, and no circumstances which would lessen the degree. It was wilful, deliberate murder, perpetrated by lying in wait, and the statute itself fixes the degree. The charge was not in violation of the statute above quoted. Neither is it a violation of any constitutional right; as in *People v. Richmond*, 59 Mich., 570, 26 N. W., 770, it was said: "Where all the facts essential to a conviction are admitted, there is nothing for the jury to pass upon, and it is not error for the court to direct a verdict of guilty." The same doctrine was held by this court in *People v. Ackerman*, 80 Mich., 588, 45 N. W., 367; *People v. Neumann*, 85 Mich., 98, 48 N. W., 290.

2. It is next contended that the court erred in refusing the request of counsel for respondent on the question of duress, and in directing the jury that no such state of facts existed as to coercion or duress used as would justify respondent in participating in the commission of the crime. We think this charge warranted by the circumstances and the testimony of the respondent himself. It would be a strange rule that would permit one to escape punishment for the crime of murder upon the plea that, three days before the crime was to be committed, he had been told that he would himself be killed if he did not go and assist; and especially under the circumstances as detailed by respondent himself. The general rule upon the subject of duress as an excuse for crime is laid down in Stephens' Digest of Criminal Law (article 31), as follows: "An act which, if done willingly, would make a person a principal in the second degree, may be innocent if the crime is committed by a number of offenders, and if done

only because, during the whole of the time in which it is being done, the person who does it is compelled to do it by threats on the part of the offenders instantly to kill him, or to do him grievous bodily harm if he refuses; but threats of future injury or the commanding of any one not the husband of the offender do not excuse any offense." Lord Chief Justice Lee, in *MacGrowther's case*, 18 State Tr., 394, which was a case of treason, the defense being duress and compulsion, said: "The only force that doth excuse is the force upon the person and present fear of death; and this force and fear must continue all the time the party remains with the rebels." Fears of future injuries do not excuse an offense. Whart. Cr. Law (9th Ed.), § 94. The necessity which will excuse a man for breach of law must be instant and imminent. Bish. Cr. Law (7th Ed.), § 352. We think the charge upon this subject was warranted by the evidence, and is fully sustained by the authorities.

By the sixth assignment of error, it is contended that the court charged, in substance, that the jury must find the respondent guilty of murder in the first degree. What the court did charge was: "If you find that at the time the murder was committed, and on that night, he actually participated; that he met, went forward, aided, either by being there upon guard, or by counseling and encouraging the commission of the crime, * * * if he was there for the purpose, intending to aid and encourage the commission of the crime, he would be equally guilty with the person or persons who inflicted the mortal wounds." It was claimed by the prosecution, and some testimony was given tending to show, the fact that respondent actually fired upon the clerk. The charge was full and fair, and presented the respondent's theory in all its phases, and protected every right to which he was entitled, under the circumstances. We have carefully examined the case, and are satisfied that respondent has had a fair and impartial trial; and the conviction must be affirmed. The other justices concurred. (61 N. W. Rep., 861.)

PEOPLE v. THOMSON.

(Supreme Court of Michigan. December 18, 1894.)

Criminal prosecution—Evidence—Statements by counsel.

On a prosecution for peddling without a license, defendant's attorney, after stating that he did not dispute the sale, stated "We admit," and thereupon gave what was apparently his defense. *Held*, that such statement could not be regarded as either evidence, or an admission, in the absence of an oath, or assent by counsel for the city.

Certiorari to recorder's court of Detroit; William W. Chapin, judge.

David Thomson was convicted of peddling without a license, in violation of an ordinance of the city of Detroit, and brings *certiorari*. Affirmed.

Frank A. Rasch, city attorney, for the people. *Oscar M. Springer* for respondent.

HOOKER, J. The defendant was convicted of the violation of an ordinance of the city of Detroit requiring hawkers and peddlers to procure a license. The defendant was engaged to work with two others in selling an article manufactured in Rhode Island, called "Soapine." He was employed and paid weekly by a Mr. Sullivan, who is claimed to be an agent of the manufacturer. They traveled about the city with a horse and cart, selling the boxes from door to door, delivering the goods and receiving pay. There is no claim that the goods were in "original packages." Counsel for the defendant contend (1) that the evidence fails to show that defendant was a hawker and a peddler; (2) that the ordinance is void under the constitution and laws of this State; (3) that it is void because in conflict with the federal constitution and laws.

The first proposition is based on testimony showing that this was an advertising scheme. The only evidence returned (judging from the printed record) is that of the officer who made the arrest and the defendant. The officer testified that the defendant admitted the sale. Mr. Springer (who was apparently counsel for the defendant) thereupon remarked: "We don't dispute the sale; we admit," and he thereupon proceeded to state as an admission what was apparently his opening of defense in the case. It finally took the form of a colloquy between the court and Mr. Springer. The record contains nothing to show that counsel for the people conceded the truth of this unique admission of a defense. We presume, however, that the word "admit" was mistakenly used by the stenographer or printer. At all events, the statement cannot be treated as evidence or admissions, in the absence of both oath and assent by counsel for the city. In answer to the question by the court, "How about the profits?" Mr. Springer said, "Here is a profit voucher that I will offer in evidence." This was a blank, unfilled, and its admission was excepted to. The defendant did not testify about the method of doing business, ownership, division of profits, etc. If the evidence is all printed (which is nowhere stated, so far as we discover), it rests on Mr. Springer's opening, which is dubbed an "admission." It is not stated that the voucher was admitted, unless it is implied by the statement that "counsel for the city excepts to the admission of the voucher in evidence." We think, therefore, that we shall be compelled to say that the evidence shows the defendant to have been engaged in peddling soapine from a wagon upon which was the name "Kendall Mfg. Co.," and that he represented that he was one of the manufacturers, who lived in Indiana, or somewhere, the witness being unable to remember where. This last was merely hearsay, and did not prove the fact.

There is nothing tangible in the record upon which to raise a question involving the federal constitution. We shall therefore discuss only the question of the validity of the ordinance under Michigan statutes. The point made upon this claim is that under the general law of Michigan (3 How. Ann. St. §§ 1262, 1263) the manufacturer was not, by anything contained in that chapter, to be prevented from selling his production without license. As there is no evidence tending to show that he was the manufacturer, or his agent, but to our minds conclusively shows the contrary, there is no occasion to consider the question further. For a case closely resembling this, see *Com. v. Gardner*, 133 Pa. St., 284, 19 Atl., 550. The judgment will be affirmed. The other justices concurred. (61 N. W. Rep., 345.)

PEOPLE v. KEEFER.

(Supreme Court of Michigan. December 18, 1894.)

Depositions--Examination of deponent--Bastardy--Remarks of Judge--Harmless error.

1. Where a witness has made a deposition, in which she avers that she cannot tell the place of her seduction, and the deposition has been admitted in evidence, the question whether she, in the deposition, made such an averment, was properly excluded by the court.
2. The expression, "Exceptions don't amount to anything in this case, I suppose you understand," addressed by the judge at the trial to respondent's attorney in a bastardy trial, was not prejudicial.
3. Error of court in refusing to strike certain testimony is cured by subsequently striking it out.
4. Where the weight of evidence clearly shows the act of intercourse at the time assigned by the complaining witness, a mistake as to the place is immaterial.
5. Previous acts of sexual intercourse are competent in evidence.
6. The judge in his charge, in referring to the time of the act, having used the expression "on or about the 10th of February," but subsequently in his charge having used the expression, "The question is, is he the father, and did he beget the child February 10, 1889?" the jury were not misled as to the date.

Certiorari to circuit court, Ionia county; Vernon H. Smith, judge.

Ulysses Grant Keefer, convicted of bastardy, appeals. Affirmed.

Frank C. Miller and George E. Nichols, for appellant. *R. A. Hawley*, prosecuting attorney, for the people.

GRANT, J. This is a proceeding for bastardy, and is the counterpart of the seduction case reported in 91 Mich., 611, 52 N. W., 60, and 58 N. W., 1007, where a sufficient statement of facts will be found. Some of the questions raised were disposed of in those decisions, and will not be here referred to.

1. Miss Badder, the complaining witness, upon cross-examination was shown her signature to a deposition taken before a justice of the peace, which was admitted. Respondent's counsel then asked her if she then testified that she could not tell the place. This was excluded by the court, on the ground that the deposition was admitted, and showed that she did so testify, and counsel could use it against her upon the argument. Counsel took exception, with the remark that perhaps she would like to give some explanation. It was unnecessary to have the witness detail the contents of her former deposition, or ask her if she remembered what its contents were. The court exercised a proper discretion in rejecting the question.

2. In preserving an exception to the ruling of the court in refusing to strike out some testimony the court remarked, "Exceptions don't amount to anything in this case, I suppose you understand." While counsel admit that the remark is technically correct, yet they contend that its tendency was to prejudice the right of respondent with the jury. We see no force in the contention.

3. A witness had testified that after the first trial of the case respondent told him that he wished he had won the case, because, if he had, he

had \$500 in his pocket that he proposed to make her a present of, because he felt sorry for her. Error is alleged in the refusal of the court to strike out this testimony. The error, if it was error, was cured by the subsequent ruling of the court striking it out.

4. Miss Badder had fixed the time when she was begotten with the child as February 10, while returning from a party at one Perrett's. On the former trial the respondent had testified that he had intercourse with her about February 10, while taking her home from a party at one Garrett's. This testimony was admitted under objection. It is claimed that it is shown that the dance at Perrett's was not in February, and that the prosecution was limited to the act of intercourse while returning from that party. There was evidence of frequent acts of intercourse between the parties about that time. It was immaterial whether the dance was at Garrett's or Perrett's. The clear weight of the evidence shows that it was at Garrett's, but the jury were justified in finding that she was mistaken as to the place, but they could not well be mistaken as to the act and the time.

5. Previous acts of intimacy and sexual intercourse were competent evidence. *Walker v. State*, 92 Ind., 474; *Ramey v. State*, 127 Ind., 243, 26 N.E., 818.

6. Complaint is made that the judge, in his charge, in referring to the time, once used the expression, "on or about February 10," and that this left the jury to find some other date than that fixed by the complaint and the evidence. At six other places in the charge the jury are expressly and specifically confined to the 10th of February. Once he said, "The question is, is he the father, and did he beget the child February 10, 1889?" There is no room for even a suspicion that the jury were misled as to the date. We find no error, and the judgment is affirmed. The other justices concurred. (61 N.W. Rep., 338.)

PEOPLE v. HARRIS.

(Supreme Court of Michigan. January 4, 1895.)

Prosecution for rape—Preliminary examination—Evidence—Instructions—Conviction of lesser offense—Animus of prosecutrix.

1. Where defendant waived examination before the justice, and upon arraignment pleaded not guilty, his right to object that there was no examination of witnesses cognizant of the facts before the issuance of the warrant was waived.
2. Where the prosecutrix was under the age of consent when the rape was committed, evidence that the defendant had had previous connection with her was incompetent.
3. Where defendant, charged with rape, requested an instruction that "to constitute the offense here charged, actual penetration must be shown," he cannot complain that the theory of a possible conviction of a lesser offense was not submitted to the jury.
4. On a prosecution for rape, the failure to refer in the charge to a quarrel between prosecutrix and defendant, which occurred after the commission of the offense, and before the making of the complaint, is not ground for reversal, in the absence of a request by defendant, when the court charged the jury to carefully weigh prosecutrix's testimony, her appearance and manner of testifying, and all other things bearing upon her testimony and credibility, and to consider the evidence of defendant, and all the evidence.

Error to circuit court, St. Joseph county; George L. Yapple, judge.

Dibbie Harris was convicted of rape, and brings error. Affirmed.

William Sadler, for appellant. *A. A. Ellis*, Attorney General, and *D. L. Akey*, prosecuting attorney, for the people.

MONTGOMERY, J. Respondent was convicted of the offense of having carnal knowledge of a female child under fourteen years of age.

It is assigned as error that the respondent had no proper preliminary examination, for the reason that it does not appear that the justice, before issuing the warrant, examined any witnesses who had knowledge of the facts, and that the complaint was made upon information and belief. On being brought before the justice, respondent waived examination, and on being arraigned in the circuit court, and called upon to plead to the information, interposed a plea of not guilty. This was a waiver of the objection now interposed. *Washburn v. People*, 10 Mich., 372; *Morrissey v. People*, 11 Mich., 343; and *People v. Williams*, 93 Mich., 623, 53 N. W., 779. And we think, under the circumstances of this case, it was a wise exercise of discretion to refuse to permit the respondent to withdraw his plea for the purpose of making a motion to quash, based upon the claim here made.

Error is assigned upon refusal of the court to permit the respondent to show by the complaining witness a statement that the respondent had had intercourse with her on an occasion previous to that fixed as the one upon which the offense was committed. The case is one in which the offense did not depend upon actual force. If the issue had been whether the complaining witness had consented to the intercourse, the testimony would have been clearly competent. But in a case where the consent of the prosecutrix affords no defense we are unable to see how the fact that the parties had had previous intercourse would aid the respondent, or tend to weaken the testimony of the prosecutrix in any way.

Error is now assigned upon the charge of the court, upon the ground that the court omitted to state that the respondent might be convicted of a lesser offense than rape, as assault, or assault with intent to commit rape. We are cited, as sustaining this contention, to the cases of *Hall v. People*, 47 Mich., 636, 11 N. W., 414, and *People v. Miller* (Mich.), 55 N. W., 675. In the latter case the respondent was convicted of the offense of assault with intent to commit rape, and what was held was that this was within the charge of rape; and, this being so, it is clear that respondent could not complain of a conviction of a lesser offense than the full charge. But it was said, referring to the case of *Hall v. People*, that "that case determined that the omission to charge the jury that defendant might be found guilty of a lesser offense was held error." We have examined the record in *Hall v. People*, and we find the fact to be that, upon the trial of the case, it appeared that the complaining witness, when she first made the complaint, charged the respondent with assault with intent to commit rape, and not with the completed offense. The charge of the court left the jury to find that the respondent might be convicted of rape, or simply of an assault, but did not leave it open for them to find that he might be convicted of the intermediate offense of assault with intent to commit rape. The present case is clearly distinguishable from *Hall v. People*. In this case, if the testimony of the complaining witness

is credited, there was no room for any middle ground. Either the complete offense of rape was committed, or no offense at all. This seems to have been the view of respondent's counsel at the trial, for the first request to charge is that, "to constitute the offense here charged, actual penetration must be shown, and that this offense is easily made and hard to disprove; and if, from all the evidence in the case, you have in your mind a reasonable doubt of the guilt of the accused, you should acquit him." The request practically excluded the theory of a possible conviction of the the lesser offense, and it does not lie with the respondent to now complain that such theory was not put before the jury.

It is also objected that the charge made no allusion to the quarrel which occurred between the respondent and the complaining witness prior to the making of the complaint. No request to instruct the jury upon this subject was preferred, and, in the absence of this, we think the instruction of the court that "the jury should carefully weigh the testimony of the complaining witness, her appearance and manner of testifying, and all other things bearing upon her testimony and credibility, and, from her evidence and that of the respondent, and all of the evidence in the case, endeavor to arrive at a just and true verdict," sufficiently protected the rights of the respondent.

The other questions risen do not call for extended discussion. We find no error in the record, and the conviction will be affirmed. The other justices concurred. (61 N. W. Rep., 871.)

PEOPLE v. ALDRICH.

(Supreme Court of Michigan. March 19, 1895.)

Intoxicating liquors—Prosecution for illegal sale—Information—Duplicity.

1. An information charging a violation of act No. 313, public acts 1887, in retailing liquors as a beverage without payment of the required tax, and without posting the county treasurer's notice and receipt therefor, is not bad for duplicity.
2. The pleadings in a prosecution for illegal sale of liquors need not describe the building in which the liquors were sold.
3. A complaint charging the illegal sale of intoxicating liquors by one "not being then and there a druggist," and alleging that such liquors were not "sold for chemical, scientific, mechanical, medicinal, or sacramental purposes," and were "not proprietary patent medicines," is broad enough to show that the accused was not selling lawfully, as a druggist.
4. Under act No. 313, public acts 1887, requiring a tax of \$500 on the business of retailing spirituous and malt liquors, and \$300 upon the business of retailing only malt liquors, a complaint charging one with selling whisky without having paid the tax required is not defective because it fails to state which of the taxes was not paid.

Exceptions from circuit court, Allegan county; Philip Padgham, judge.

Ellis Aldrich was convicted of the sale of intoxicating liquors in violation of law, and excepts. Affirmed.

Fred A. Maynard, Attorney General, and *F. E. Fish*, prosecuting attorney, for the people. *Ed J. Anderson* (*H. H. Pope*, of counsel), for defendant.

LONG, J. Respondent was convicted for the violation of the law regulating the sale of intoxicating liquors, being act No. 313, public acts 1887. The complaint states that: "On the 6th day of January, 1894, at the township of Wayland, in the county aforesaid [Allegan], Ellis Aldrich, late of the township of Wayland, in said county, was then and there a person whose business consisted of the sale of intoxicating liquors at retail, and was then and there engaged in, and did then and there unlawfully engage in, the business of selling and offering for sale intoxicating liquors at retail as a beverage, and did then and there sell, to wit, two drinks of liquor, to wit, whisky, to Lynn E. White and Roy B. Summers and divers other persons, the same not being proprietary patent medicines, and without having first paid in full the tax required by act No. 313 of the public acts of 1887, and without having the receipt and notice for such tax posted up in the place where such liquors were kept, as required by said act; he, the said Ellis Aldrich, not being then and there a druggist, and said liquor not being then and there sold for chemical, scientific, mechanical, medicinal, or sacramental purposes, contrary to the form of the statute," etc. The warrant follows the same form. On the examination a motion was made to quash the complaint and warrant and to discharge the respondent for the following reasons: (1) That the complaint and warrant contain three distinct offenses in one and the same count, to wit: One for not having paid the tax as therein described, as required by section 1 of the act; one for not having posted the notice required by section 6; and one for not having posted the receipt as required by the same section; and that, therefore, the count is bad for duplicity. (2) That the complaint and warrant should describe the building where said liquors were sold. (3) That they do not state that the receipt and notice were not posted in the place or room where the liquor was sold. (5) That the complaint and warrant do not negative the fact that said liquors were sold by respondent as a druggist "in strict compliance with the law." (6) That they do not state whether respondent was engaged in the business requiring the payment of the \$300 tax or the \$500 tax, under section 1 of said act there being two distinct retail businesses under that section; and they do not state which of those taxes he failed to pay. (8) That the allegation that the notice and receipt were not posted as required by law is insufficient, as the complaint and warrant should set up the facts. This motion was denied, and the respondent held for trial in the circuit. The information follows the form of the complaint and warrant. The respondent refused to plead to the information, and a motion was made to quash the information, and discharge the respondent, on the ground that the justice acquired no jurisdiction over him for the reasons set forth. This was denied, and the cause proceeded to trial, and the respondent was convicted. The errors assigned relate to the questions raised on the motion to quash.

Act No. 313, public acts 1887, provides by section 1 that a tax of \$500 shall be paid upon the business of selling at retail spirituous and malt liquors; upon the business of selling only brewed or malt liquors, \$300. Section 4 provides for the payment of the tax to the county treasurer before commencing such business. Section 6 provides for the giving of a receipt by the county treasurer for the money so paid, specifying its form. It also provides the giving by the county treasurer of a printed notice containing a statement that the tax has been paid, and also that such notice and receipt shall be posted in a conspicuous place in the room

or place where the business is carried on. It is provided by section 7 that: "If any person or persons shall engage or be engaged in any business requiring the payment of a tax under section one of this act without having paid in full the tax required by this act, or without having made, executed and delivered the bond required by this act, or shall in any manner violate any of the provisions of this act, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof, if there is no specific penalty provided therefor by this act, shall be punished by a fine," etc. The complaint, warrant and information are not bad for duplicity: Only one offense is alleged, and that is for unlawfully engaging in the business of selling and offering for sale at retail intoxicating liquors as a beverage, without having first paid the tax, and without having the receipt and notice posted up as required by Act No. 313, public acts 1887. This question is settled in *Luton v. Circuit Judge*, 69 Mich., 610, 37 N. W., 701. It could not be understood by the jury that they were called upon to try the question of sales to the persons mentioned in the pleadings, as there is no allegation that the sales to such persons were unlawful, except as made so by not having paid the tax, posted the notice, etc. The complaint could not be sustained for a specific unlawful sale upon any other theory than that the tax was not paid, and there is no allegation that the sales to such persons were unlawful, except that the tax had not been paid. In *People v. Keefer*, 97 Mich., 15, 56 N. W., 105, the information charged in the same count a sale of liquor to a specified person and keeping a saloon where intoxicating liquors were sold and furnished as a beverage in violation of the provisions of the local option law. That count charged: "Did then and there run a saloon and bar, and at said saloon and bar did then and there sell and furnish Frank S. Fellhauer and divers other persons spirituous and intoxicating liquors, * * * and did then and there knowingly keep a saloon where * * * intoxicating liquors * * * were sold and furnished as a beverage." It was held bad for duplicity. It was said: "While it is true that, as a general rule, where several cognate acts are forbidden in one section of a statute disjunctively, the indictment may ordinarily charge them conjunctively in one count if the reference is to one transaction for which a single penalty is incurred, it is also true that, where each forbidden act may be set up as a distinct offense, but several are united, the count is good in such case for one combined act;" citing *State v. Schweiler*, 27 Kan., 499. Here the unlawful act charged was engaging in the business and selling liquors to these persons without having paid the tax, etc. What is alleged as to specific sales to them would be treated as surplusage. It is the general doctrine that, if an indictment contains necessary averments, these are to be treated as mere waste material, to pass unnoticed, having no legal effect whatever. Bish. Cr. Law, § 229. If the indictment is founded on a statute, and it contains allegations covering all the terms of the statute and making a complete offense, then it adds something by way of making the offense appear more enormous. This latter matter may be disregarded as mere surplusage. It will have no effect to vitiate the indictment, and it need not be proved. *State v. Staples*, 45 Me., 320; *Hodgman v. People*, 4 Denio, 235. It was not necessary to describe the building in the pleadings. *People v. Ringsted*, 90 Mich., 371, 51, N. W., 519. The pleadings do state that the receipt and notice were not posted where the liquors were kept for sale. The contention that the complaint and warrant do not negative the fact that

said liquors were sold by respondent as a druggist in strict compliance with the law, and therefore must be held not to state a cause of action, cannot be sustained. The statement is broad enough to show that he was not selling lawfully as a druggist. The allegation is as broad as in *Luton v. Circuit Judge, supra*, a charge identical with the present. That case was reaffirmed in *People v. Scott*, 90 Mich., 376, 51 N.W., 520. The point that there is no allegation as to which tax was not paid has no force. That question was settled in *Luton v. Circuit Judge, supra*. The verdict must be sustained, and the court is advised to proceed to judgment on the verdict. The other justices concurred. (62 N. W. Rep., 571.)

PEOPLE v. FOWLER.

(Supreme Court of Michigan. March 19, 1895.)

Adultery—Jury—Qualifications—Trial—Opening statement—Witness—Evidence—Improper argument of counsel.

1. The improper dismissal of a juror on challenge for cause is not ground for reversal where no objection was made to the competency of the jury, and it does not appear that the regular panel was exhausted, or that the complaining party had exhausted his peremptory challenges.
2. A statement in good faith by the prosecuting attorney, in his opening argument, that he expected to prove certain facts, not followed up by proof, is not ground for reversal where he discovered on the trial that he could not substantiate the statement by proofs.
3. On a prosecution for adultery, the husband of the woman with whom it is alleged to have been committed is incompetent to testify to facts tending to establish the offense.
4. Testimony that the witness had seen the daughter of the woman crying, and that she stated that other children had twitted her about defendant's going to her mother's house, and asserted that defendant was the father of her brother, is inadmissible, and error in admitting it is not cured by subsequently striking it out.
5. It is error to admit evidence tending to show a similar offense, committed three months after that alleged in the indictment.
6. It is reversible error to permit the prosecuting attorney to use language calculated to prejudice defendant's case, without checking him, or instructing the jury to disregard his remarks.

Exceptions from circuit court, Hillsdale county; Victor H. Lane, judge.

Fred E. Fowler was convicted of adultery, and excepts. Reversed.

F. A. Lyon, for appellant. *Fred A. Maynard*, Attorney General, and *Guy M. Chester*, prosecuting attorney, for the people.

LONG, J. Respondent was convicted of adultery. While the jury were being impaneled for the trial, Samuel Woodruff was called and testified on his examination that if, upon the trial of the cause, he should find the evidence equally balanced, he would render a verdict in favor of the defendant, because, if there was any doubt in his mind, he should think the defendant would be entitled to the benefit of it. He also stated sub-

stantially that he would naturally give the defendant the benefit of the doubt. He was asked: "Would you naturally be inclined to do this?" Answer: "Yes, sir." Question: "Independent of any rule of law?" Answer: "Yes, sir." The people thereupon challenged the juror for cause, and he was dismissed from the panel. Defendant insists (1) that no cause was shown which authorized his dismissal from the panel; (2) that defendant's rights were prejudiced by the action of the court. If it be conceded that the ground of challenge was not sustained, yet it is evident that the defendant was prejudiced in no substantial right, inasmuch as it does not appear that the regular panel of jurors was exhausted, or that the people had exhausted their peremptory challenges, and no objection was made to the competency or impartiality of the jury which was obtained. *Mining Co. v. Johnston*, 23 Mich. 39; *Luebe v. Thorpe*, 94 Mich., 268, 54 N.W., 41. The theory of the prosecution was that on the 17th day of February, 1892, the respondent went to the house of the complainant, Mr. Peck, and there, in the absence of the husband, went into the sleeping room with Mrs. Peck, and they went to bed together, staying in bed from 9 o'clock in the morning until about noon. To prove this the prosecution called Mr. Emmer K. Eastman, who was stopping at the house of Mr. Peck, who testified substantially: That on the date in question he went over to a grocery store, about a mile and a half away, and on returning he found no one in the house below. That he went up stairs, and heard a rustling of bed clothes. He entered the bedroom, the door of which was open, and he saw two forms in bed, covered up; the pillows in their proper place, the bed clothes all nicely tucked in on both sides of the bed. That there were no signs of any one's being there, except the two forms in the bed, all covered up; and, if respondent was there, he was in bed, all covered up, hat, boots, and all. He went down stairs, took a newspaper, and sat down a short distance from the stair door, and stayed there until afternoon. Mrs. Peck came down stairs, and requested witness to go down cellar and get some pork. When he went down the cellar stairs, he heard two persons coming down the stairs above. He hastened back up the cellar stairs, looked out of the cellar door, and saw Mrs. Peck and respondent coming out of the stairway. On opening the case to the jury, the prosecuting attorney stated that the people would show that in the winter prior to the alleged act Mr. Peck had found the respondent concealed behind the door of his wife's sleeping room. No evidence was given on the trial to support this statement, and it is claimed that the statement was so prejudicial to the rights of the respondent that a new trial should be granted. If this were the only error in the record, we might hesitate to reverse the case on that ground. If this statement were made in good faith by the prosecuting officer, and on the trial he found that the proofs did not substantiate the statement, we do not think, for that reason alone, the case should be reversed. The prosecuting attorney may not always find that the proofs will meet the case he expects to make when he makes his opening statement to the jury and it is not every failure of proof, under such circumstances, that warrants a reversal. In this case the fact was not proved, and the jury must be presumed to have based their verdict upon the evidence, and not upon the statement of counsel. But, as the case must be reversed upon other grounds, we presume that on another trial there will be no complaint of like character, as the prosecuting officer's duty is to explain to the jury the nature and elements of the issue that they are to try, and not to make

statements that will not be supported by the evidence. The prosecution claims that when the statement was made it was expected that proofs would be allowed to support the statement, and the husband of Mrs. Peck was called to prove the fact, but his testimony was excluded by the court. It is contended by the people that the court was in error in excluding this testimony. The testimony was properly excluded. *Hanselman v. Dovel* (Mich.), 60 N. W., 978, and cases there cited. Testimony was admitted of certain conversations with Mrs. Peck in the absence of the respondent. This was error. As to respondent, it was clearly hearsay. *People v. Montague*, 71 Mich., 447, 39 N. W., 585; *Dallon v. Dregge*, 99 Mich., 253, 58 N. W., 57; *Com. v. Thompson*, 99 Mass., 444. Mattie Doolittle was called as a witness by the prosecution, and testified that she was teaching school, only a few rods from the respondent's house, and that she had seen respondent go to and from the Peck house several times a day during that winter. On cross-examination respondent's counsel asked: "How did it happen that your eyes were on Fred Fowler, instead of your school?" to which she replied: "The scholars had a great many times twitted Julia Peck [the daughter of Mrs. Peck] of Fred Fowler's going there." On redirect examination the prosecutor asked: "State what the fact was as to how she [Julia Peck] came to you; what her appearance was, and what she said about this." Under objection, the witness answered: "She was crying, and complaining that the scholars were telling her that Fred Fowler was Zerilla's [a brother of Julia] father, and that Rodney Fowler was her father." This testimony was subsequently stricken out, but the error was in admitting it. It had a tendency to injuriously and seriously affect the rights of the respondent. It had no place in the case, and it cannot be said, under the circumstances, that the error was cured in striking it out. *People v. Pinkerton*, 79 Mich., 110, 44 N. W., 180. Testimony was admitted tending to show a similar offense on May 6, 1892. This was some three months after the offense charged in the information. The court was in error in admitting this testimony. Acts of intimacy in this class of cases prior to the offense charged may be shown, but it is wholly incompetent to show subsequent acts for any purpose. *People v. Clark*, 33 Mich., 112; *People v. Etter*, 81 Mich., 571, 45 N. W., 1109; *People v. Hubbard*, 92 Mich., 326, 52 N. W., 729. In the closing argument to the jury the prosecuting attorney referred to the fact that Mrs. Peck had not been sworn in the case. This was objected to, and the prosecuting attorney said: "Well, let Mr. Lyon comment upon Mrs. Peck. When he wants to talk, it is all right for her to be in the case." This language was entirely uncalled for. The prosecutor had no right to thus attempt to prejudice the respondent, and the trial court should not have permitted these remarks, and, if made, should have directed the jury that they could not weigh that fact against the respondent. *People v. Hendrickson*, 53 Mich., 525, 19 N. W., 169. The principal errors complained of have been discussed. We need not refer to the others of minor importance, as upon a retrial they will undoubtedly be corrected. The judgment below must be reversed, and a new trial ordered.

GRANT, J., did not sit. The other justices concurred. (62 N. W. Rep., 572.)

PEOPLE v. SUTHERLAND.

(Supreme Court of Michigan. March 19, 1895.)

Assault—Certificate of commitment—Sufficiency of complaint—Appeal—Instructions—Evidence—Witness—Cross-examination.

1. A certificate of a committing magistrate stating that it appears to him that an offense has been committed, and that there is just cause to suspect the defendant to be guilty thereof, is a sufficient finding of probable cause, under How. Ann. St. Mich., § 9471, and will confer jurisdiction on the circuit court to try the case where the whole of the evidence and proceedings had before the magistrate are not in the record.
2. A contention that a complaint for assault to do great bodily harm less than the crime of murder, pursuant to How. Ann. St. Mich., § 9122a, is insufficient, because omitting the words "the crime of," is not available when urged for the first time on appeal.
3. On a prosecution for assault with intent to do great bodily harm, testimony of the person assaulted as to the nature and extent of his wounds is competent to show the intent.
4. It is proper to permit the witness to exhibit his injuries to the jury.
5. Questions to a prosecuting witness on cross examination as to whether he had been arrested for being drunk, and how many times he had been drunk, since the trouble, are properly excluded as irrelevant.
6. The defendant, upon becoming a witness in his own behalf, is subject to the same rules of cross-examination, and the prosecution has the same right to inquire fully into his antecedents, as in the case of any other witness.

Error to circuit court, Branch county; Noah P. Loveridge, Judge.

George Sutherland was convicted of assault to do great bodily harm less than the crime of murder, and brings error. Affirmed.

John S. Evans, for appellant. *Fred A. Maynard*, Attorney General, and *Wm. H. Compton*, prosecuting attorney, for the people.

LONG, J. Respondent was convicted of an assault with intent to do great bodily harm less than the crime of murder. Upon the respondent's being arraigned, he refused to plead, and his counsel moved to quash the information, for the reasons. "That the papers filed in said case, purporting to be the return of the justice, have no certificate; that the respondent has had no examination according to the statute; that the justice had no jurisdiction of the cause, and that the circuit court has no jurisdiction; that the justice did not find probable cause to suspect the defendant guilty of any offense; that there is nothing to show that the evidence of the witnesses was reduced to writing, if there was any taken before the justice, or that the witnesses signed their testimony; nor that the respondent waived examination; and that the complaint does not show that there was a felonious assault made." These objections were overruled, and raise the first question in the case. The whole of the proceedings had before the justice do not appear to be in the record presented here, but from the part returned it appears that the justice did certify as follows: "It appears to me that said offense has been committed, and there is just cause to suspect the said defendant to be guilty thereof." The statute for the examination of offenders provides that: "If it shall appear that an offense not cognizable by a justice of the peace has been

committed and if there is probable cause to believe the prisoner guilty thereof and the offense be bailable, etc., he shall take bail, and, if no bail be offered, commit the prisoner for trial. How. Ann. St., § 9471. This examination is not a judicial inquiry, in which the guilt or innocence of the party accused is finally decided upon, but an inquiry to ascertain whether the crime alleged has been committed and whether there is reasonable ground to believe the party accused may have committed it. *People v. Lynch*, 29 Mich., 279. The certificate made by the justice was sufficient to confer jurisdiction upon the circuit court to try the cause. He does certify that it appeared that said offense had been committed, and that there was just cause to suspect the defendant to be guilty thereof. He used the word "suspect" and not "believe." This is sufficient, and a sufficient finding of probable cause. We are unable to say that the examination was not full and complete, as the full return of the examination is not in the record. The offense was set up in the complaint and warrant.

It is contended, however, that the justice had no jurisdiction of the cause. The complaint recites that: "On the 14th day of June, 1893, * * * George Sutherland with force and arms, in and upon him, the said Wily Putnam, did make an assault, and him, the said Wily Putnam, did beat, bruise, wound, and ill treat, with intent then and there to do great bodily harm to him, the said Wily Putnam, less than the crime of murder." The warrant contained the same recital, and the contention is that no offense is stated within the term of the statute. How. Ann. St., § 9122a, provides, "that any person who shall assault another with intent to do great bodily harm less than the crime of murder shall be punished," etc. It is contended that in leaving out the words "the crime of" no offense is stated. It does not appear from the record that this specific objection was made in the court below, and the information followed the same form. The court below evidently regarded the words as contained in the complaint, warrant, and information, for, in the charge, the court, in stating the offense, employed the words of the statute, and his attention was not called, even at that time, to this omission in the pleadings. If the objection had been made at that time, an amendment would have been allowed, under How. Ann. St., § 9535, which provides that: "Every objection to any indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment before the jury shall be sworn, and not afterwards; and every court before whom such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no defect had appeared." As this defect was one which would have been amended if attention had been called to it, it must, after verdict, be disregarded. *Merwin v. People*, 26 Mich., 305.

Some testimony was given under objection, for the purpose of showing the violence of the assault as bearing upon the question of intent. The testimony was admissible, and properly explained to the jury in the general charge, as the court instructed them as follows: "The people claim that the respondent, at the place and time alleged, made an unprovoked assault upon the complaining witness; that he kicked him in the face, producing a fracture of the jaw; that he knocked him down, and kicked him several times in the chest; and that such blows and kicks were given by the respondent with intent to do him, Putnam, great bodily harm less

than the crime of murder. * * * In order to find the intent to do great bodily harm by breaking the jaw, you must find that the respondent contemplated such result. You must consider the means which the respondent employed, and whether the use of such means would naturally lead to such a result. It may not have been necessary that the respondent should have contemplated precisely such a result as fracture of the jaw, but it is necessary that you should find he contemplated a result that would have produced great bodily harm or serious injury." Respondent sought to show upon the trial a justification for the act, and upon that question the court charged the jury: "If you believe that the complaining witness went to the respondent's house, and accused his family, as it is claimed he did, the respondent had the right, in defense of his family and dwelling, to expel the complaining witness from his dwelling house and premises, and to use all reasonable and necessary means to compel him to depart." No written requests to charge were presented, and it is apparent that the charge as given stated the law applicable to the case. Many objections are made to the charge, but we do not deem it necessary to discuss them specifically, as we find no error in the charge as a whole.

Several objections are made to the testimony introduced. Such objections will be discussed so far as we deem it necessary. The complainant, Wily Putnam, was called as a witness, and without objection detailed with great minuteness the assault, and the result upon himself. He was asked: "Have you any wounds now upon your face in consequence of the kicking of the respondent?" This was objected to as immaterial, and admitted. "Answer. Yes, sir; under my chin. Question. Have they been running ever since? (Objected to as incompetent.) Answer. It has been running ever since. Two or three weeks after the assault, a big abscess formed, and the doctor lanced it, and quite a number of bones worked out." This testimony was competent as showing the aggravated character of the assault, and there was no error in permitting the witness to exhibit his injuries to the jury. On cross-examination, respondent's counsel asked the witness if he had been arrested for being drunk, and he answered that he had. He was then asked: "Since this trouble, how many times have you been drunk?" This was properly excluded. It had no bearing whatever on the issues involved in the case. Some questions are raised in reference to the cross-examination of the respondent. He was sworn and examined in chief by his counsel. It was proper on cross-examination to go as fully into his antecedents as it would have been with any other witness in the case. Under the statute the respondent in a criminal case may now be sworn in his own behalf. When introduced as a witness, he is subject to the same rules of cross-examination as any other witness in the case; and we find nothing improper in the cross-examination. The conviction must be affirmed.

GRANT, J., did not sit. The other justices concurred. (62 N. W. Rep., 566.)

PEOPLE v. DUNCAN.

(Supreme Court of Michigan. March 19, 1895.)

Rape—Evidence.

1. On a prosecution for rape of a child 13 years of age it was error to permit the people to show a conversation between prosecutrix and a friend regarding the offense, five months after its commission, when her only reason for not complaining before was that respondent told her that if she told it would be worse for her, and that she was afraid of him.
2. A witness in a rape case, after testifying that before the commission of the offense she saw respondent pulling prosecutrix around, said that her husband remarked about it at the time. In his argument the prosecuting attorney referred to the act as being an improper overture, so notorious as to attract the attention of both witness and her husband. *Held*, that in admitting said testimony error was committed, which was rendered harmful by the prosecuting attorney's remarks.
3. In a prosecution for rape of a child 13 years old prosecutrix testified that she never had intercourse before the alleged offense, that it did not hurt her, that no blood followed, and that she was not sore the next day. *Held*, that it was error to refuse to allow respondent to show that the natural result of intercourse with one of prosecutrix's age would be pain, followed by blood and soreness.
4. When the statement of a witness is unreasonable, the jury are not bound to accept it as true.
5. What became of the child born to the prosecutrix in a rape case as the result of the offense is immaterial on the trial of the alleged offender.

Exceptions from circuit court, Allegan county; Philip Padgham, judge.

Arthur Duncan was convicted of rape, and excepts. Reversed.

Fred A. Maynard, Attorney General, and *F. E. Fish*, prosecuting attorney, for the people. *C. R. Wilkes* and *H. Hart*, for defendant.

LONG, J. Respondent was convicted of rape upon one Phoebe Caruthers, a female child under the age of fourteen years. The evidence of the girl tended to show: That in March, 1893, the respondent came after her to go to his father's to work. She went there, and worked until some time in November following. At that time the family consisted of respondent's father and mother, his wife, and three children, and, part of the time, the hired man, one Burns Coats. That she became acquainted with respondent at the home of Mr. Blossom, a few months before she went to work for Mr. Duncan. In August, 1893, respondent's wife took her youngest child, and went away on a visit, and did not return until after the alleged offense had been committed. The family occupied the upper part of the house for sleeping. The girl's room was so situate that she was compelled to pass through the room occupied by respondent; and she testifies that about August 20, in the morning, in passing through his room, he threw her upon the bed, and there had intercourse with her; that in November she left there, and went to live with a Mrs. Dan. A child was born to her on June 20, 1894, at Mrs. Dan's house. The respondent denies that he ever had intercourse with her. The people introduced evidence tending to show acts of intimacy between the parties prior to that time. The extent of these acts are that respondent "fooled around her," as some of the witnesses state, and others, that he was seen

to take her by the arms. All these acts were apparently innocent in themselves, so that the whole case hinged upon the testimony of the girl alone. She was contradicted by the mother of respondent in many particulars about the time when she arose that morning, and as to the whereabouts of the respondent at that time. To sustain the girl's statement, the people were permitted to show what she stated to Mrs. Dan along in January, following the time of the alleged offense, as well as what Mrs. Dan said to her. The girl testified, as to the reason she had not made the communication before, that the respondent said to her at the time of the intercourse: "It would be worse for me than for him if I did tell, and I better keep still, and because I was afraid of him." This was the sole ground upon which the girl was permitted to state what was said between herself and Mrs. Dan. She stated: "Mrs. Dan said I had a bad cold, or something else was the matter, and she asked if anybody had been fooling around me, and I told her nobody, only Arthur Duncan; and she said, 'You must not lay it to him if it is not him;' and she said, 'Just tell who it is;' and I said it was nobody but him." It appears that, at the time the girl was at respondent's father's, a son of Mrs. Dan, by the name of Burns Coats, also worked there, and slept upstairs. Coats had on several occasions gone home with her from Mrs. Dan's house. It is contended by counsel for respondent that this testimony as to conversations between the girl and Mrs. Dan was incompetent and prejudicial to respondent, because (1) there was no evidence showing that complainant had any reason to refrain from telling because of any threats respondent had made; (2) because the girl was more than fourteen years old at the time she made the statement to Mrs. Dan.

The rule is stated by Professor Greenleaf as follows: "Though the prosecutrix may be asked whether she made complaint of the injury, and when and to whom, and the person to whom she complained is usually called to prove the fact, yet the particular facts which she stated are not admissible in evidence except when elicited on cross-examination, or by way of confirming her testimony after it has been impeached. On the direct examination, the practice has been merely, to ask her whether she made complaint that an outrage had been perpetrated upon her, and receive only a yes or no. Indeed, the complaint constitutes no part of the *res gestæ*. It is only a fact corroborative of the testimony of the complainant, and, where she is not a witness in the case, it is wholly inadmissible." 3 Greenl. Ev. § 213. In *People v. Gage*, 62 Mich., 271, 28 N. W., 835, and *People v. Glover*, 71 Mich., 304, 38 N. W., 874, testimony of a third party was admitted, not as a part of the *res gestæ*, but in each case it was placed upon the ground that the girl's age was of tender years (ten or eleven years old), and it appeared that from fear each had been prevented from telling sooner. In *People v. Hicks*, 98 Mich., 88, 56 N. W., 1102, in speaking of the rule and what had been held in other cases, it was said: "But exceptional cases have arisen, when rape was charged, where third parties have been allowed to detail conversations with the prosecutrix. In *People v. Gage* this was allowed. It was not permitted upon the ground that the complaint of the prosecutrix was a part of the *res gestæ*, but as corroborative of her testimony, and for the reason that the party outraged was of tender years, and that her silence for a length of time was the direct consequence of fears of chastisement, induced by threats of the perpetrator of the wrong. This case goes to the extreme of the rule, and borders closely upon dangerous ground." In the present

case it is clear that no such threats were made, and the girl was nearly fourteen years of age when the crime is alleged to have been committed. Mrs. Dan certainly would not have been a competent witness to detail what was said between the prosecutrix and herself, and to state what the prosecutrix said at that time, five or six months afterwards, nor to state that the prosecutrix claimed that the respondent was the one who got her into the trouble. The testimony of the prosecutrix detailing conversations with Mrs. Dan, if admissible at all, was admissible as corroborative of the fact of the intercourse in August preceding. It could not be received for that or any other purpose. Whatever the girl said to others and what third parties said to her would in no sense tend to corroborate her statement of the offense having been committed, and especially as to the person who committed it. Such testimony, admitted by the court, would naturally be received by the jury as corroborative of the main fact in the case.

The prosecution called Mrs. Blossom as a witness. She testified that, while the girl was at her house, the respondent worked there several days; this was before she went to live at respondent's father's; that, while there, she noticed the respondent taking hold of the girl's arm, and pulling her around, and she added: "I know my husband remarked about it at the time." Counsel moved to strike this out, and the motion was denied. The prosecution in the final argument to the jury remarked upon this testimony by saying: "While she was at Blossom's he makes improper overtures towards her, and he takes hold of her so that it attracts the attention of Mr. and Mrs. Blossom, and Mrs. Blossom speaks of the matter to her husband. There is the commencement, the conception, of the crime which we claim has been committed in this case." The answer of Mrs. Blossom should have been stricken out as requested. The acts of the respondent there seem to have been tortured by the prosecution into improper overtures, while, in fact, his conduct bears no such construction, and what the husband of Mrs. Blossom said about it was hearsay, and had no place in the case. But, being in, the prosecution took advantage of it in the argument as the basis of some undue intimacy. It was thus made harmful in the extreme to the respondent.

The girl testified that she never had intercourse with any man before, and that it did not hurt her at all, and that no blood followed the intercourse, and that she was not lame or sore the next day. The defense sought to show by Dr. Mitchell that the natural result from the intercourse with a young girl of that age would be pain, soreness, and blood following it. This was excluded. When the question was asked, the court said: "What has this got to do with the case?" Counsel replied: "It directly contradicts the girl as to the effect upon her at that time." After the charge was given, one of the jurors asked: "May I ask a question in regard to this case before we go out?" The court: Anything you don't understand. Juror: Well, it was something that was argued here yesterday that I heard you talk. I thought maybe I misunderstood you, when you were talking about no blood and no soreness. I understood you to tell them that it made no difference in regard to this case. The court: Well, of course, that is a question for you, under all the circumstances. I cannot enlighten you about it. There is no evidence in this case, as I understand it, except that of the girl about blood or soreness. I do not understand that there is any only hers. There is no other evidence. Juror: I thought I heard you give your decision yesterday.

The court: What is that? Juror: I understood you yesterday to give a decision in regard to that. The court: Well, I don't recollect now that I said anything particular about that. The evidence was offered here, and refers to something about that, but there was no other evidence introduced; that is all. Counsel: Your honor does not mean that they are obliged to accept a statement that is unreasonable, although sworn to? The court: The jury have a right, under all the circumstances of the case, to render their verdict. They must put their own construction on the evidence, and the whole of it; there cannot anybody else for them." The defense had the right to contradict the girl upon every material point by any competent evidence. She had testified to penetration by the respondent, and, as the result, the birth of a child some ten months after the act of intercourse. She had testified that no one had ever had intercourse with her before that time, and that no blood followed, and that she was not lame or sore. If it be a fact that the natural result of such first intercourse with a girl of her age would be a flow of blood and soreness and lameness, the respondent had the right to show it; and the testimony was offered for the purpose of showing the fact. It was competent for that purpose. But the juror understood that that fact in the case would make no difference; that it was immaterial whether the fact could be proved or not, as it would have no weight if the fact existed; and he appeared to be puzzled as to just what the court meant. The court did not enlighten him, and he returned to the jury room apparently with the view that, inasmuch as the girl had sworn to the intercourse, that ended the question. When the court's attention was called to the situation by counsel's asking if the jury were obliged to accept a statement that was unreasonable, although sworn to, the court responded: "They have the right, under all the circumstances, to render their verdict." The court was in error in this treatment of the question.

The girl was asked on the trial what had become of the child, and was permitted to answer that it had been taken away from her. No claim was made that the respondent was instrumental in taking it away. What had become of the child was of no importance, unless the respondent was in some manner connected with it, and the testimony should not have been permitted.

For the errors pointed out, the verdict must be set aside, and a new trial granted.

GRANT, J., did not sit. The other justices concurred. (62 N. W. Rep., 556.)

PEOPLE v. DE FRANCE.

(Supreme Court of Michigan. April 2, 1895.)

Credibility of witness—Evidence to impeach—Criminal appeal—Objection not made below—Dentist as witness—Privileged communications.

1. On a trial for forgery committed November 23, 1891, at Kalamazoo, Mich., P, a witness for defendant, testified that on that date the accused was in Detroit, and that witness borrowed money of him, giving his note therefor, which he paid April 11, 1892, to the defendant personally, at Detroit. *Held*, that evidence that accused was in Minnesota on April 11, 1892, was competent, as bearing upon the credibility of P's evidence.

2. The objection that a witness' name was not endorsed on the information cannot be taken for the first time on appeal.
3. How. St., § 7516, providing that communications to persons authorized to practice medicine or surgery shall be privileged, relates to general practitioners, and dentists are not "surgeons," within the meaning of such act.

Error to circuit court, Kalamazoo county; George M. Buck, judge.

Stonewall J. DeFrance was convicted of forgery and appeals. Affirmed.

Edwin F. Conely and *Orla B. Taylor* (*E. M. Irish* and *A. J. Sawyer*, of counsel), for appellant. *Fred A. Maynard*, Attorney General, and *Alfred S. Frost*, prosecuting attorney (*F. E. Knappen*, of counsel), for the people.

MONTGOMERY, J. The respondent was charged, in the circuit court for the county of Kalamazoo, with having, on the 23d day of November, 1891, uttered a forged draft, purporting to have been drawn by the Pontiac National Bank, of Pontiac, Michigan, on the Merchants' National Bank of New York, for the sum of \$12,500, and upon which he is claimed to have received from the First National Bank of Kalamazoo an advancement of \$5,000. The testimony on behalf of the people tended to show that the respondent came to Kalamazoo on the 10th of November, and registered at the Burdick House under the name of Louis Forrest; that he gave out that he was an agent of the Standard Oil Company, and desired to purchase some land in the vicinity of the city for that company; that he visited the bank in question on two or three occasions, and was introduced to the president by one Hammond, with whom he had become acquainted in his efforts to find land suitable for his alleged purposes. On Monday morning, the 23d, he presented the draft in question, and received \$5,000 in currency, and was credited on the books of the bank with the balance. He immediately left the city, and was not discovered to the bank officials until October 2, 1893, when he was arrested in Detroit, where he had been living since the time of the alleged offense. The defense consisted of a denial of the identity of respondent with the man Forrest, who committed the offense, and the chief question of fact was that of the identity of the respondent. The defendant offered testimony tending to show that during the time the man known as Forrest was in Kalamazoo, he, the respondent, was in the city of Detroit constantly. Among other witnesses called for the purpose of proving this fact respondent called as witnesses Thadeas Galvin, John Galvin, and James Galvin, who testified that on the 21st of November, 1891, they entered into a contract with respondent, which contract was produced and introduced in evidence, and purported to have been executed on that date, and to have been signed by the Galvins and by defendant. Respondent also called as a witness William Peabody, who testified that on the 23d of November, 1891, he borrowed \$300 in money of respondent, and executed his promissory note for the amount; that the note was afterwards paid, on the 11th of April, 1892, to Mr. DeFrance personally, at the house of the witness and that DeFrance receipted for it on the back. This note purported to have been signed by Peabody, and was indorsed on the back: "Paid, April 11, '92. S. J. DeFrance." It appeared by the testimony of the people that at the time the man known as Forrest appeared at Kalamazoo his teeth

presented a different appearance than those of the respondent subsequently presented; that the two front incisors were separated distinctly, and that now this peculiarity does not appear. The people called as a witness Charles H. Land, a dentist, who testified that between the 30th of November and the 4th of December, 1891, he inserted three false teeth in the place of the two incisors for the respondent. The prosecution called as a witness one Cornelius W. Britt, an attorney, who testified that he prepared the contract purporting to have been executed by DeFrance and the Galvins on the 21st of November, 1891, after respondent's arrest and imprisonment, and by the respondent's direction. They also called two witnesses whose testimony tended to show that the indorsement purporting to have been made on the back of the note of William Peabody on April 11, 1892, and purporting to have been signed by DeFrance, could not have been made at that time, as he, De France, was at that date, and for some days prior, in St. Paul, Minn. This statement of facts is sufficient to show the relevancy of the questions raised in the brief of counsel which we deem it necessary to discuss.

Respondent's counsel contend that error was committed in getting before the jury the claim that respondent had been guilty of similar offenses to those charged, and occurring at a later date. The prosecution called as a witness F. W. Anderson, of St. Paul, Minn., who testified that he was president of the St. Paul National Bank, and first met the respondent at St. Paul on April 11, 1892. He was then asked under what circumstances he met the respondent at that time, and counsel for the respondent objected, on the ground that it related to a separate and distinct offense. The jury was excluded during the discussion, and the court ruled the testimony inadmissible. The court did not depart from this ruling during the trial, but it is claimed that counsel, by putting questions to witnesses, sought to convey the impression to the jury that the respondent had been guilty of offenses at other times and places. This subject will be referred to later on. The prosecution, in rebuttal, called as a witness William B. Geery, who testified that on the 11th of April, 1892, the respondent was in St. Paul, and was seen by the witness in the St. Paul National Bank. This testimony was corroborated by F. W. Anderson, the president of the bank, and on the cross-examination of these witnesses facts were elicited which tended to show that he was guilty of some transaction which occasioned an attempt on the part of the bank officials to procure his arrest. It is strenuously insisted that this line of testimony was incompetent. Counsel invoke the rule that it is not competent to impeach a witness by contradicting him upon immaterial points, and it is said that the fact of the Peabody note having been indorsed as paid on the 11th of April was an immaterial or collateral fact, and that it was incompetent to dispute the testimony of the witness upon this point. The court received the testimony as bearing upon the credibility of the testimony of the witness Peabody, and in this we think no error was committed. Counsel contend that the falsity of the indorsement could not affect the authenticity of the note itself, and say, "Suppose the date of the indorsement were false for some reason, would the contents of the note be false for that reason also?" The witness Peabody, as before stated, produced this note for the purpose of corroborating his own testimony, and his testimony as a whole was that he borrowed, on the 23d of November, 1891, \$300 of respondent; that he gave this note, that

the note was paid on the 11th of April, 1892, to Mr. De France personally, at his house in Detroit, and that De France receipted it on the back. This note was supposed to represent the transaction between the parties, the whole transaction, and nothing else. The witness told a connected story supported by one document, which was either true or false, and we cannot understand how it can be said that testimony showing that this instrument, which was produced for the purpose of corroborating his testimony, was false in one particular, might not be and ought not to be weighed by the jury in determining the question of whether the whole instrument was prepared for the especial occasion, and for the purpose of corroborating his testimony. Not only was the testimony competent upon this question, but to our mind it was persuasive evidence for this purpose, and it is not surprising that it should have had the effect of discrediting the witness with the jury. The court distinctly limited the application of this testimony by instructing the jury as follows: "Whether or not the respondent was in St. Paul on April 11, 1892, has no tendency to prove that he was in Kalamazoo in November, from the 11th to the 23d, 1891. You may, however, consider this testimony as bearing upon the credence to be given to the testimony of the witness Peabody as to the whereabouts of the respondent, November 23, 1891." This instruction was entirely proper. If the witness Peabody had produced a forgery for the purpose of supporting his testimony, and the prosecution was able to show that the instrument which he produced for that purpose was in part a forgery, it would be most extraordinary to hold that this fact might not be taken into account in determining the weight to be given to his testimony upon all points in the case.

Numerous objections were taken to the conduct of counsel with reference to the witness Britt. First it is said that his name was not indorsed upon the information, but, as this point was not made below, it cannot be considered here. If the objection had been there made, it would have been incumbent upon the prosecution to have shown a sufficient reason for the failure to indorse his name upon the information, and sufficient grounds for leave to place it upon the information after the trial had commenced. But, no such objection being made, no opportunity was afforded the prosecution to make this showing, and there is no question before us for review, relating to it. The other questions raised bear rather upon the fairness of the testimony of the witness Britt than upon the question of the admissibility of his testimony. Counsel seek to show by references to testimony that Britt was a willing witness, and that counsel for the people were at pains to present him to the jury as an unwilling witness, and that this conduct was prejudicial, and was intended to be. At the best the record presents a question of fact as to whether the witness was a willing or unwilling witness, and there is no legal question involved in relation to the subject, so far as we can discover.

Counsel contend that the testimony of the witness Land was a privileged communication, under the provisions of section 7516, How. St., which provides that "no person duly authorized to practice medicine or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." The question presented is whether this language includes a dentist. At the common law,

information gained by a physician or surgeon while in attendance upon his patient was not privileged. The purpose of this statute was to throw around such disclosures as the patient is bound to make for the information of his attending physician the cloak of secrecy, and the prime object of the act was to invite confidence in respect to ailments of a secret nature and the spirit of the act would not include a case where the infirmity was apparent to every one on inspection. In practice, however, the statute has not been so limited in construction, for the reason that the words of the act are broad enough to include any information necessary to enable the physician to prescribe or the surgeon to act. Nevertheless, the purpose of the act is to be considered in determining whether the dentist was intended to be included within its terms. Certainly the terms "dentist" and "surgeon" are not interchangeable, and if a dentist is to be held to be a surgeon, within the meaning of this act, it must be because his business as a dentist is a branch of surgery. It is apparent that the act related to general practitioners, and to those whose business as a whole comes within the definition of "physician" or "surgeon." A dentist is one whose profession it is to clean and extract teeth, repair them when diseased, and replace them, when necessary, by artificial ones. The only case which we have found which bears directly upon this question is that of *State v. Fisher* (Mo. Sup.), 24 S. W., 167, in which a majority of the supreme court of Missouri held that a dentist is not to be considered a surgeon. We think there was no error in admitting the testimony of this witness; that he is not within the terms or the spirit of the act.

Many of the errors assigned relate to the alleged misconduct of the counsel for the prosecution. We have given to the briefs of counsel and to the record very careful examination upon this branch of the case. It is contended that the counsel committed error in propounding questions to witnesses which he knew to be incompetent, and which implied facts which were not admissible, and the intimation of the existence of which was damaging to the respondent. It is true that counsel put numerous questions to witnesses which were excluded, but we are by no means convinced of the bad faith of counsel in this particular, and on the contrary, consider that the counsel for the prosecution were acting in the utmost good faith. The trial extended over two weeks, as is stated. The respondent was ably defended. The counsel for the prosecution would have been derelict in their duty had they not sought to put before the jury all the facts which, in their judgment, were admissible as bearing upon the question of the respondent's guilt or innocence. That they were mistaken in some of the positions taken, and that the court below ruled against them upon their offers of certain testimony, by no means implies that they were guilty of any bad faith. In the concluding argument of counsel for the prosecution, this occurred: "Now, I asked to put Judge Mills on the stand. (Objected to.) He is not here, but I want to ask you if you believe from the testimony that you have got in this case so far—" Counsel was here interrupted with an exception. The reference to Judge Mills should not have been made, but the circuit judge, very properly, in charging the jury, said: "The testimony of Judge Mills was excluded by the court. Counsel for the people have no right to suggest to you what Mills would have sworn to had he been placed upon the stand. I do not remember, gentlemen, that there has been any suggestion made as to what Mills would have sworn to if placed

upon the stand, but I give you this instruction out of abundance of caution. If any such suggestion was made, you should disregard it altogether. Judge Mills was not placed upon the stand. You are to decide this case according to the testimony which has been given, and nothing else." It is impossible to conceive that, after this very clear instruction, the jury could have been prejudiced by the remarks of counsel. As a matter of fact, the record does not show that he did state any fact that he could have proven by Judge Mills, or what the testimony of Judge Mills would have been if he could have been called. This was emphasized by the charge of the court, and it would be a reflection upon the intelligence of the jury to assume that after this very clear instruction they could have been influenced by this mistake of counsel in any way whatever.

Complaint is made of the instruction of the court to the effect that "in passing upon the testimony of the witnesses for the respondent the jury had the right to take into consideration any interest which such witness might feel in the result of the suit, growing out of their relationship with respondent or otherwise, and give to the testimony of such witness or witnesses such weight as it was deemed entitled to under all the circumstances proved on the trial, and that in considering the testimony given by the respondent in his own behalf they might consider whether or not such testimony was affected in any manner by his interest in the result of the prosecution." We do not understand that counsel contend that these instructions were not proper enough in themselves, but it is said: "A general charge that the jury should consider the interest of all witnesses would not have been objectionable; but when nothing is said about the people's witnesses, and attention is directed to the respondent and his witnesses, and the jury is told that their interest is an important consideration, the rights of the accused are not properly protected." But upon turning to the record we find that the respondent's counsel asked and the court gave numerous instructions relating to the question of the weight to be attached to the testimony of various witnesses for the prosecution. Respondent's thirtieth request, as follows, was given by the court: "In considering the question of identification, you may consider the fact that the witness Wagner swore to a complaint for the arrest of the respondent before he had seen him, and also upon his visit to Detroit the respondent was brought into his presence alone, in such a manner that there could be no doubt as to the person charged with the crime," etc. And again: "If the jury believe from the evidence that the witness Hammond did in fact indorse the draft in controversy in this case, you may consider this fact as bearing upon the likelihood of his identifying an innocent party instead of the guilty party." And again: "If you find that the witness Britt conspired to put up false testimony in the case, this would be a crime under the laws of the State. You may consider any temptations which are apparent from his testimony and the motives by which he is actuated." And again: "If you believe that the witness Britt wilfully falsified in any single particular, you are at liberty to disregard his testimony altogether." And finally, on his own motion, the court charged the jury as follows: "You are the sole and exclusive judges of the credibility of each and every witness who has testified in this case. As to some of the witnesses, you have been told that you should receive their testimony with great caution. As to others, you have been instructed that you may consider any interest which they may have in the result of this case, and these instructions you should heed. But it is equally true that you are

to give to the testimony of each and every witness who has been sworn upon this trial just so much or so little credit as you find it is entitled to. You are the sole judges of the credibility of the witnesses as well as of the weight of the evidence in the case." It is apparent that the circuit judge fairly presented the question of the credibility of the witnesses to the jury and that he gave all proper requests of respondent's counsel and the jury could not have failed to understand that the question of the credibility of the witnesses was solely for them. The charge of the court as a whole was a fair and covered all the questions presented by the record. The respondent had a fair trial. We think his rights were fully protected and that the conviction should be affirmed.

GRANT, J., did not sit. The other justices concurred. (62 N. W. Rep., 709.)

PEOPLE v. GAULT.

(Supreme Court of Michigan. April 2, 1895.)

Intoxicating liquors—Indictment—Plea of former conviction.

1. An information for illegally selling liquor, which alleges, substantially in the language of the statute, that defendant engaged in the business, "not being then and there a druggist who sells," etc., is sufficient, although omitting after such clause the words, "in strict compliance with law."
2. The payment in advance of the annual tax required by law is a condition precedent to engaging in the business of selling liquors, under 3 How. St. § 2283d1, requiring payment of such tax on or before the 1st day of May; and the fact that a dealer may have been engaged in the business during the preceding year will not render lawful sales made by him on the 1st day of May, before payment of such tax, on the ground that he is privileged, under section 8, to furnish the bond therein required on that day, and may lawfully continue the business until he has an opportunity to file it.
3. A conviction of selling intoxicating liquors on June 30th without paying the tax is not a bar to a subsequent prosecution for making similar sales on May 1st, which latter date was not declared on in the information, or referred to in the evidence, in the former case.

Exceptions from circuit court, Montcalm county; Frank D. M. Davis, judge.

James Gault was convicted of selling liquor without having paid the annual tax, and brings exceptions. Affirmed.

Fred A. Maynard, Attorney General, and *Bert Hayes*, Prosecuting Attorney, for the people. *Ellsworth & Rarden*, for defendant.

MONTGOMERY, J. The respondent is charged with having, on the 1st day of May, 1893, been engaged in the business of selling and offering for sale malt, brewed, and fermented liquors, without having paid the annual tax required by law, and without having receipt and notice for said tax posted up. The information alleges that said James Gault, not being then and there a druggist who sells or then sold liquors for chemical, scientific, medicinal, mechanical, or sacramental purposes only was then

and there engaged," etc. The statute exempts from the penal provisions of the act druggists who sell liquors for chemical, scientific, medicinal, mechanical, or sacramental purposes only, and in strict compliance with law; and it is urged that the present complaint is insufficient for the reason that the words "in strict compliance with law" are omitted. It would seem plain enough that, if respondent was not a druggist who sold liquors for the purposes named at all, it cannot be said that he was one who sold them for the purposes named in strict compliance with law. The question is ruled by *Luton v. Circuit Court*, 69 Mich., 610, 37 N. W., 701; *People v. Scott*, 90 Mich., 376, 51 N. W., 520; and *People v. Aldrich* (decided at the present term), 62 N. W., 570.

It is next urged that the respondent could not be convicted of the offense charged for prosecuting his business on the 1st day of May, the record showing that he had been engaged in the business the previous year, as section 8 of the act (section 2283d1, 3 How. St.) provides that "every person engaged in the sale of spirituous, malt, brewed, fermented or vinous liquors, except druggists, shall, before commencing such business, and on or before the first day of May in each and every year thereafter, make, execute and deliver to the county treasurer of the county in which he is carrying on such business, a bond," etc. And it is urged that if the respondent was privileged to furnish the bond on the 1st day of May it cannot be inferred that the continuation of the business until the respondent should have had the opportunity to file such bond is to be deemed unlawful. But we think this question should be controlled by the provisions of section 4, providing that the person engaged in the business, etc., "shall, on or before the first day of May in each year, pay to the said county treasurer, in advance, the taxes required by said section one for such business for the year commencing on the said first day of May, and ending on the thirtieth day of April next thereafter;" and section 7 provides: "If any person or persons shall engage or be engaged in any business requiring the payment of a tax under section 1 of this act without having paid in full the tax required by this act," etc., he "shall be deemed guilty," etc. We think the sections, when read together, must be construed to mean that the advance tax must be paid before one can lawfully engage in the business, and that it was not intended that one having engaged in the business in the previous year should, in this respect, stand on a different footing than one who sought to engage in the business anew on the 1st day of May.

The most important question presented is that arising under a plea in bar interposed by the respondent. It appeared by the plea in bar that the respondent had been previously arrested and convicted of the offense of having been unlawfully engaged in the business without having paid his tax, and so forth, on the 30th of June, 1893; and the question presented is whether this conviction is a bar to the present information, under which the respondent is charged with having been engaged in the business on the 1st day of May, 1893. We are disposed to hold that the former prosecution cannot be treated as a bar. The offense of which the respondent was charged was complete on the 1st day of May, 1893. Had a prosecution then been instituted for this offense, and the respondent thereafter arrested for a like offense committed on the 30th day of June, 1893, it is conceded that the prosecution for the prior offense would not constitute a bar, and we are unable to see why, in reversing the facts, the same rule does not obtain. The general rule is that, in order to bar a prosecution,

it is not sufficient for the defendant to show that he has been indicted, and either acquitted or convicted, since the date of the offense now alleged against him. He must prove that the former acquittal or conviction is for the same offense now complained of. See *Black, Intox. Liq.*, § 555; *State v. Andrews*, 27 Mo., 267; *State v. Shafer*, 20 Kan., 226; *State v. Blahut*, 48 Ark., 34, 2 S. W., 190. The offense with which the respondent is charged was complete at the 1st day of May, 1893. The conviction which is pleaded in bar was one in which he pleaded guilty to an offense contained and set forth in the information, which charged him with having, on the 30th day of June, been engaged in the business of selling and keeping for sale intoxicating liquors, etc., without having paid the tax required by law. The offense is not only distinct from the charge contained in the present information, but distinct from the offense established by the proofs offered by the prosecution; and we think it should not be deemed a bar. In section 7 of the act, being section 2283d of Howell's statutes, it is provided that "each violation of any of the provisions of this act shall be construed to constitute a separate and complete offense, and for each violation on the same day or on different days, the person or persons offending shall be liable to the penalties and forfeitures herein provided." It is true that in a prosecution charging the offense as having been committed on a particular day, the proof need not be limited to that precise day, and the prior prosecution would bar a prosecution for any offense which came within the proof offered by the prosecution on the prior trial, but beyond this the rule could not be extended. The point is made that the evidence is insufficient to show that sales were actually being made by the respondent on the day in question. But we think that there was sufficient to go to the jury upon this question, and that the charge fairly presented the issue to the jury. The conviction will be affirmed, and the circuit judge advised to proceed to sentence. The other justices concurred. (62 N. W. Rep., 724.)

PEOPLE v. OBLASER.

(Supreme Court of Michigan. April 2, 1895.)

Receiving stolen goods—Impeachment of witness—Arguments of counsel.

1. On a trial for receiving stolen property, it appeared that the complaining witness found her pocketbook, but with the money gone; that, later in the day, she missed a revolver which she and her husband testified to having seen within a few days; that upon defendant's arrest, 10 days thereafter, the revolver was found under his pillow. Defendant claimed at one time to have procured the weapon from a man who had purchased it. *Held* sufficient to sustain a verdict of guilty.
2. Evidence of statements made by the State's witness on defendant's preliminary examination, for the purpose of impeachment, should be introduced after defendant's counsel has taken the case, and not upon the cross-examination of such witness.
3. A statement by the prosecuting attorney in his argument, that "he [referring to defendant's counsel] says this man has as good record as any one in the court room. Why don't he show it?"—was not improper, being induced by remarks of defendant's counsel wholly outside the evidence.

Error to recorder's court of Detroit; William W. Chapin, judge.

August Oblaser, convicted of the offense of receiving stolen property, appeals. Affirmed.

Turner, Turner & Crawford, for appellant. *Allen H. Frazer*, prosecuting attorney, *O. F. Hunt*, assistant prosecuting attorney, for the people.

HOOKE, J. The defendant was convicted of the offense of receiving stolen property, consisting of a revolver. The owner, a woman, left her house during the afternoon, the doors being locked. On her return she found her pocketbook upon the stand, and money that it had contained was gone. That evening she missed her revolver, which had been kept in the stand drawer. She could not say when she saw it last, but she and her husband testified to having seen it within a few days. Ten days later, the defendant was arrested, and a revolver was found under his pillow, which complainant identified as hers. The defendant told conflicting stories about it, one of them being that he procured it from a man whom he knew to have had it a year before, because he was with him when he bought it. He refused to give his name, and advised the officer to arrest him for stealing the pistol, if he thought best. It is contended that this did not establish the larceny of the pistol. We think the circumstances were sufficient to sustain a conviction by the jury. The case differs from that of *People v. Montague*, 71 Mich., 318; 39 N. W., 60, as will be readily seen by an examination of that case.

On cross-examination, Mr. O'Neil was asked by defendant's counsel if he did not testify upon the examination that he would not swear that the revolver found was the one lost, and that the marks on his were lower down. He admitted the latter, but denied making the former statement. He admitted being sworn, and that the revolver was shown him, and said that he corrected the statement about the screws being lower down. Counsel for the defendant then said: "I will read your testimony. [Reading.] 'Saw the revolver next when Downey [the officer] brought it to me. This is not the one.' Q. Did you testify to that? A. No, sir. Q. Is that your signature there to that testimony taken in the court below? A. That is my signature. Mr. Turner: I introduce this testimony and evidence of the witness taken below. (Mr. Hunt objected, and cross-examination continued.)" This was not the proper time to offer this evidence for the purpose of impeachment. It should have gone in, if at all, with the other impeaching testimony upon the same subject, after the defendant's counsel took the case. It is unimportant, however, as the bill of exceptions fails to show exception taken to its exclusion.

During the argument, the prosecuting attorney, referring to counsel for defendant, said: "He says this man has as good a record as any one in the court room. Why don't he show it?" Nothing shows that evidence of good character was given, and counsel for the defendant seems to have so far forgotten himself as to make statements outside of the record. Had the prosecutor replied by saying there was no evidence that he had a good record, no fault could have been found. This was but another way of saying it. It was plainly invited. The judgment must be affirmed. The other justices concurred. (62 N. W. Rep., 732.)

PEOPLE v. EZZO.

(Supreme Court of Michigan. March 12, 1895.)

Prosecution for rape—Evidence—Instructions—Reasonable doubt.

1. The complaining witness may state why she did not make complaint to her mother immediately after the commission of the crime.
2. An instruction which defines proof beyond a reasonable doubt to be "such proof as satisfies the judgment and conscience of the jury, as reasonable men applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible," is correct.
3. The failure of the court to instruct the jury that they may convict the prisoner of any offense included in the crime charged, when no such instruction is asked by counsel, and when the evidence shows that the prisoner is either guilty as charged or not guilty of any crime, is not error.

Error to superior court of Grand Rapids; Edwin A. Burlingame, judge.

Donato Ezzo was convicted of the crime of rape, and brings error. Affirmed.

Samuel D. Clay and *Nathan P. Allen*, for appellant. *Fred A. Maynard* Attorney General, and *Alfred Wolcott*, Prosecuting Attorney, for the people.

GRANT, J. The respondent was convicted of the crime of rape upon his stepdaughter, 16 years old.

1. It was not error to permit the prosecution to ask the complaining witness why she did not make complaint to her mother immediately after the commission of the crime. It is always competent for the prosecution to explain such a delay. In response she testified that he threatened to kill her if she did.

2. It is insisted that the court did not correctly instruct the jury upon the subject of a reasonable doubt. The instruction was as follows: "The respondent comes before you presumed to be innocent of the offense charged in this information, and that presumption continues to surround him until removed by evidence that satisfies your minds beyond any reasonable doubt of his guilt of the offense charged; and by proof beyond a reasonable doubt I mean such proof as precludes every reasonable hypothesis except that of the respondent's guilt of the offense charged. It is proof to a moral certainty, as distinguished from an absolute certainty. Proof beyond a reasonable doubt is not beyond all imaginary doubt, but such proof as satisfies the judgment and conscience of the jury, as reasonable men applying their reason to the evidence before them, that the crime charged has been committed by the respondent; so satisfies them as to leave no other reasonable conclusion possible." The charge is very clear and explicit, and covers the entire ground.

3. It is contended that the court erred in not instructing the jury that they might convict the respondent of any offense included within the charge laid in the information, viz., assault with intent to commit rape, or assault and battery. No such request was asked, and under the evidence the respondent was either guilty of the crime charged or not guilty

of any crime. In criminal as well as in civil cases it is the duty of counsel to specifically call the attention of the court to points on which they desire the jury to be instructed. The instruction was entirely correct, so far as it concerned the crime alleged in the information, and it is fair to presume that it was argued to the jury upon that basis. There were only two witnesses, the respondent and his accuser. If the jury believed him, he had taken no liberties whatever with her, and her story was absolutely false. If they believed her, all the elements which constitute the major crime were proven. The judgment is affirmed. The other justices concurred. (62 N. W. Rep., 407.)

PEOPLE v. CASE et al.

(Supreme Court of Michigan. April 16, 1895.)

Sale of liquors—Information—Unwilling witness—Examination.

1. The preliminary proceedings upon which an information for keeping a saloon open on Sunday were formally correct, but in the charge of the information the word "liquors" was omitted. *Held*, that since it was in the power of the court, under 2 How. Ann. St., §9535, to amend a formally defective indictment, it must be held, after verdict, that defendant was not prejudiced by the omission.
2. Where a witness on a prosecution for keeping a saloon open on Sunday was required by law to be called by the people, and was apparently unwilling to testify, it was proper to allow the prosecution to use, as a basis of interrogation, statements subscribed and sworn to by the witness on the preliminary hearing of the case.
3. Where the defendant in a criminal case was confronted, on the preliminary examination, with a witness for the people, and cross-examined him, the constitutional provision that a defendant shall be confronted by the witnesses against him is not violated by permitting the people, on examination of such witness upon the trial, to question him as to the testimony given by him on the examination.
4. The warrant and return are admissible on a trial under an information.

Error to circuit court, Shiawassee county; Charles H. Wisner, judge.

Edwin J. Case and Frank B. Shelp were convicted of keeping an open saloon on Sunday, and bring error. Affirmed.

A. L. Chandler and *M. V. B. Wixom*, for appellants, *Fred A. Maynard*, Attorney General, and *Frank H. Watson*, Prosecuting Attorney, for the people.

HOOKER, J. The defendants were convicted of a violation of the liquor law, the specific charge being that they "being then and there keepers of a saloon * * * where spirituous, brewed, fermented, and intoxicating — were sold, at retail, and said 21st day of January, 1894, being the first day of the week, commonly called Sunday, did not keep said saloon closed," etc. No mention was made of the omission of the word "liquors" at the trial, the first time that it was brought to the attention of the court being at the time of the settlement of the bill of exceptions. Error is assigned upon it. In an indictment this would be a fatal defect. There would be nothing upon the face of the proceedings to show that

liquors had any connection with the case, and the indictment would contain the only reliable evidence of the nature of the offense found by the grand jury to have been committed. The indictment precedes and is the foundation of action by the grand jury. In proceeding by information the practice is different. The information is not filed until an investigation and determination of the charge by a magistrate have been had. The complaint and warrant are returned with his certificate to the circuit court. The information must accord with them in substance. If it does not, it will be quashed and a new one filed, or it may be amended before trial, and in some cases it has been amended during the trial. It stands at common law on different grounds from an indictment. See Bish. Cr. Proc., § 715, and authorities cited; 1 Am. & Eng. Pl. & Prac., 696.

In the case before us the complaint, warrant, and recognizance contained the word, and the court should have permitted an amendment had it been asked. There was no possible injury to the defendant, and its omission should be disregarded as a clerical error, which the record furnished the means of correcting. 2 How. Ann. St., § 9535;¹ *People v. Schultz*, 85 Mich., 114, 48 N. W., 293; *People v. Perriman*, 72 Mich., 184, 40 N. W., 425; *People v. Smith*, 94 Mich., 644, 54 N. W., 487; *Byrnes v. People*, 37 Mich., 515. The complaint was made by a woman who claimed that her husband, Mr. Hovey, procured liquor from defendants' saloon upon the Sunday in question. Mr. Hovey was a witness, and manifested an indisposition or inability to testify with the same degree of positiveness that he manifested upon the examination. The prosecutor claimed the right to ask leading questions, upon the ground that he was an adverse witness; and the court seems to have been impressed with the fact that he was an unwilling witness, to say the least. The witness was asked by the prosecuting attorney: "Q. Did you go to this saloon that day? A. Don't know whether I did or not, for certain. Mr. Watson: I desire to read this man's evidence that was taken in justices' court; then I desire to have the court give him some instructions in the case. Mr. Chandler: I object to its being read. The court: This witness must tell what he knows about this case. If the court becomes convinced that he is not telling what he knows, he will have him in prison when the time arrives, if I am not convinced he is not telling all he knows about this case. Q. Were you there on the 21st day of January, 1894, at that saloon? A. I think I was. I think I was in town. Yes, sir; I was in town. Q. Were you at their saloon? A. I don't want to swear positively that I was in there, because I was on a spree. Q. Did you swear positively in justice's court? A. I might have. Q. Was it true? A. I am not going to say. Q. I ask whether what you swore to in justice's court was true. A. To my best recollection, it was. Q. That was within a few days after this took place? A. I think it was. Q. Did you swear there that you were at that saloon on the 21st day of January? No answer. Q. Is that your signature? [Testimony in justice's court shown witness.] A. Yes, sir. Q. That testimony was read over to you? A. I think it was. Q. You heard it all? A. Yes, sir; I think I did. Q. Did you there at that time swear like this: 'They kept a saloon. It was located on the south side of the street running east and west in Bancroft, Shiawassee county.' (Objected to as incompetent, immaterial, and improper. Objections overruled, and defendant excepted.) The court: He can read it, and ask the

¹ 2 How. Ann. St., §9535, provides in effect, that the court, upon objection to an indictment for a formal defect, may cause the same to be amended.

witness if he so testified." The prosecutor thereupon read the entire deposition of this witness taken upon the examination, and he was examined upon it. The deposition was a positive statement of facts, free from expressions of doubt, and gave the circumstances in detail. If the record shows all that occurred upon the trial, we have failed to discover it, and we are unable to say that the court was not justified in his apparent conclusion that the witness was quibbling. The judge said nothing of the kind, but seems to have thought it necessary to inform the witness of what he might expect if he became convinced that he was refusing to tell all that he knew. This was dangerous ground, by reason of its implication, but it was not objected to, nor was any exception taken. The next important question is that relating to the reading of the deposition. We are impressed, as the circuit judge was, that the witness was unwilling to testify. His deposition contained unqualified testimony of violation of the law, upon the Sunday mentioned, by repeated sales. If it was not a case of the people's witness attempting to avoid testifying against a defendant, it certainly justified that claim upon the part of the prosecution. Whether it was caused by collusion or was voluntary we need not consider. The important question is, whether the public has any relief in such cases, and, if so, what it is. The witness was one whom the prosecutor was required by law to call. It has been held that a party might even impeach an adverse witness by showing a bad reputation for truth and veracity, when the witness was one whom the party must call; e. g. subscribing witness to an instrument. 1 Greenl. Ev., § 443, and cases cited. The reason usually given for the rule that a person cannot impeach his witness is that he is presumed to know his character, and that by calling him he represents him as worthy of belief. 1 Greenl. Ev., § 442. And the court, in *Com. v. Welsh*, 4 Gray, 535, went so far as to hold that such witness, who on direct examination testified that he did not know certain facts, could not be asked if he did not on a former occasion testify to them. But in *Rex v. Oldroyd*, Russ. & R., 88, it was held that a party might contradict his witness by reading her former deposition. Mr. Greenleaf states that there is a diversity of opinion upon this subject, but that "the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify, or that the witness has recently been brought under the influence of the other party, and has deceived the party calling him; for it is said that this course is necessary for his protection against the contrivance of an artful witness, and that the danger of its being regarded by the jury as substantive evidence is no greater in such cases than it is where the contradictory declarations are proved by the adverse party." See 1 Greenl. Ev., § 444, and note 2. These are cases when the party voluntarily called the witnesses, and may reasonably differ from cases where they must be called. Our attention has not been called to a case where a subscribing witness called by the prosecution has been impeached by the prosecuting officer, but no good reason suggests itself why the rule should not be as applicable to criminal as to civil cases. The only effect of the impeachment would be to eliminate the testimony of such witness. A former contrary statement could not be used as substantive evidence of the fact so stated. See *McClellan v. Railway Co.* (Mich.), 62 N. W., 1025, where the authorities are collected. If this practice is permissible, we see no difference in principle

between such a witness and any other witness whom the people are bound to call. But impeachment was not attempted here. An attempt was made to overcome the witness' disinclination to divulge, by confronting him with his former statements, not made privately, but taken in the form of testimony, subscribed and under oath. See *Beaubien v. Cicotte*, 12 Mich., 486.

The only other objections to this are that the jury might take the former testimony as substantive evidence against the defendant, and that the constitution requires that a defendant shall be confronted by his witnesses. As to the first of these there is no more danger than in any case of impeachment, and a request to charge would have protected the defendants. To the second objection there is no force, for the defendants were confronted by and cross-examined this witness at length upon the examination, and this has been held sufficient to permit the introduction of testimony to prove substantive facts where the witness was dead. This testimony was not received for that purpose, if it can be said, legally and technically, to have been received at all, within the meaning of this constitutional provision. It was read to the witness as a basis of interrogation merely. To say that a defendant could not cross-examine most rigidly an adverse witness upon his former statements and depositions would be a great hardship, and there can be no difference between the defense and the prosecution in this respect, unless it be a possible difference growing out of the constitutional provision mentioned. If the propriety of the practice be once established, then it would seem to be the right of the witness to have the whole writing read. *Lightfoot v. People*, 16 Mich., 507; *People v. Sweeney*, 55 Mich., 591, 22 N. W., 50. We think the record fails to show that error was committed in permitting the reading of this testimony.

The introduction of the warrant and return was proper, though not necessary. They were part of the proceeding. Every juror will be presumed to know that a certificate of probable cause is usually necessary to such proceedings. It is not shown that improper use was made of these papers.

Complaint is made of language of the prosecuting attorney. Upon the facts of the record, we might be justified in saying that abstractly one or more of his remarks to the jury were uncalled for; but we have no means of knowing whether or by what they were provoked, and, as we have frequently said, ordinarily these things must be left to the trial judge to deal with.

The judgment of the circuit court will be affirmed.

LONG and MONTGOMERY, JJ., concurred with HOOKER, J. GRANT, J., did not sit.

MCGRATH, C. J. (dissenting). The prosecuting attorney, in addressing the jury in this case, made use of the following language: "In considering a case, it is not expected that we are going to throw aside our knowledge as men, and you know that this Sunday trade is peculiar. And it is only when some person gets mad that the proof can be obtained, and because high-toned, respectable men do not go there, especially when they have to sneak in at the back door; and such as are there would sooner swear for their saloon keeper than for their minister or their wife. You nor I never found a saloon keeper yet who, when arrested for keeping

open after hours or upon Sunday, would not go upon the witness stand and swear positively that it was not open at all, and get all the suckers he wanted to testify for him." There had been a horse trade between one Hovey and defendant Case. The complaint was made by Hovey's wife. She says: "Q. You may tell the jury whether or not if this complaint would have been lodged against the men who kept the saloon if they had not injured your husband or you in a horse trade in some way? A. Well, I don't know. I had threatened it all summer. Q. Didn't you state to them, if they traded back horses and delivered up the note, if they didn't do that you would have them pulled? A. I told them, if they would bring back the horse and the \$9.50 note, that I would not. Q. And, if they didn't bring the horse back and the \$9.50 note, that there would be a complaint made against them? A. Yes, sir. Q. They didn't bring it back? A. No, sir. Q. So the complaint was made? A. Yes, sir. The court, to witness: Did you say that you had been threatening to make a complaint all summer? A. Yes, sir. Mr. Watson: You went down there after your husband came home drunk on this Sunday? You say you had threatened to have them arrested for selling him liquor? A. Yes, sir. Q. You went down after he came home drunk on Sunday? A. Yes, sir. Q. And saw West? A. No, sir; Shelp. Q. And had a conversation with him? Now, what was that conversation? A, I called him out, and I told him that that horse trade and liquor had made quite a bit of trouble, and I was going to make it better or worse, and wanted them to have the horse back there the next morning and the \$9.50 note, or I would have them arrested for selling liquor on Sunday. He said he didn't now and I says, 'You did no longer ago than last Sunday,' and he said they would not do it again." Shelp denies this. The only other witness called by the people was the husband, who, upon the examination before the justice, had testified that himself, both of the proprietors, and seven other persons, naming them, were in the saloon on the Sunday in question. He also stated that, before the complaint was made, his wife had threatened to have defendants arrested because of the horse trade, and that "she told me that she had told Case, if he did not return the horse, she would pull the saloon." On the trial in the circuit, both proprietors testified that the saloon was not open on the Sunday in question, and each of the seven persons testified that he was not in the saloon on that day. There was absolutely nothing brought out upon the trial affecting the credibility of a number, if not all, of these witnesses. In view of the testimony tending to show a motive for the complaint, the character of the people's principal witness, and the testimony of nine persons contradicting the people's principal witness on the material point in the case, it is inconceivable that the defendants should be found guilty, unless the jury was influenced by the prosecuting attorney's remarks, which were without support in the record. So far as the witness Hovey was concerned, in view of the animus of the complaint, the most reasonable theory was that he did not tell the truth at the preliminary examination. I think that, upon this record, defendants should be granted a new trial. (62 N. W. Rep., 1017.)

THE PEOPLE v. WILLIAM KENNEDY.

(Filed April 16, 1895. Affirmed.)

Criminal law--Violation of liquor law--Information--Alley--When public place.

INFORMATION:—In a prosecution under a statute it is sufficient to charge the commission of the offense in the language of the statute.

PUBLIC ALLEY:—In a prosecution for a violation of a liquor law it is not incumbent on the prosecution to show the dedication of the street or alley, but it is sufficient if the fact appear that it was, at the time of the commission of the offense, open to the use of the general public.

Fred A. Maynard, Attorney General, and *Fidus E. Fish*, prosecuting attorney, for the people. *H. H. Pope*, for appellant.

MONTGOMERY, J. This is a prosecution for a violation of section 3 of the liquor law, being section 2283f4, 3 How. Stat. The section provides that during the time when, by the provisions of this act, places where liquor is sold or kept for sale must be closed, all curtains, screens, partitions and other things that obstruct the view from the sidewalk, street, alley or road in front of or at the side or end of said building, of the bar or place in said room where said liquors are sold or kept for sale, shall be removed. Any person who shall violate any of the provisions of this section shall, upon conviction thereof, be punished as provided in section 7 of this act."

The questions are raised upon this appeal, the first as to the sufficiency of the information, and the second as to the sufficiency of the proof to sustain the information.

"The information charged that the respondent was, on the 2d day of April, 1894, that being election day, proprietor of and kept a saloon where intoxicating liquors were sold at retail in a room in the rear of the office of the Sherman House hotel, on Hubbard street, in the village of Allegan; that on said last named day, that being a day when, by the provisions of act No. 313, laws of 1887, said saloon was required to be closed, the curtains, screens, partitions and other things that obstructed the view from the sidewalk and street and alley in front of and at the side of the building in which said saloon was, of the bar and place in said room where said liquors were sold and kept for sale, were not removed; but on the contrary thereof, said William Kennedy did then and there, as aforesaid, obstruct the view from said sidewalk, street and alley in front of and at the side of the building in which said saloon and room were, by not removing said curtains, screens, partitions and other things that then and there obstructed the view so as aforesaid, contrary," etc.

It is said that this complaint is substantially in the same form as the one set out in *Robinson v. Haug*, 71 Mich., 38, and of which Mr. Justice Campbell said: "The complaint in question is not a good one." The majority of the court in that case did not pass upon the sufficiency of the complaint, and it is true that Mr. Justice Campbell did not deem the complaint a good one but for what reason is not stated in the opinion. The complaint differs in some particulars from the information in question, and we cannot regard that case as controlling.

It is a general rule that in prosecution under a statute it is sufficient to charge the commission of the offense in the language of the statute.

People v. Taylor, 96 Mich., 546.
Durand v. People, 47 Mich., 332.
Rice v. People, 15 Mich., 9.
Howell's Stat., 9539.
People v. Wakely, 62 Mich., 297.

The offense in this case consists of the failure to remove the curtains, screens, partitions and other things that obstruct the view from the sidewalk, street or alley, of the bar. It is very clear that the information charges that the curtains, screens, partitions and other things that obstructed the view of the bar and place in said room where said liquors were sold and kept for sale, were not removed. We think it is also clear that it sufficiently charges that the respondent was responsible for their not being removed, as he, under the law, being the keeper of the place, must have been. It charges, first, that he was the proprietor and kept the saloon; second, that he then and there obstructed the view from the sidewalk, street and alley by not removing said curtains, screens, partitions and other things that then and there obstructed the view from the street, sidewalk and alley. "Said" curtains, screens, etc., are those of which it is alleged in the previous part of the information that they obstructed the view of the bar and place in said room where liquors were sold and kept for sale. We think the information is sufficient.

II. The reason alleged why the proofs were insufficient is that the testimony tended to show that the alley, the view from which was obstructed, was not a public place, but private ground, and it contended that the legislature meant by the word alley a public alley, similar to a public street, and not a private passage way. The evidence tended to show that the alley, the view from which was obstructed, had been in use by the public for more than twenty years; that during all that time no person was ever denied the right to travel over it on foot or with teams. It was used daily and extensively, and there was testimony to the effect that on some days as many as 250 teams and persons passed over it. The circuit judge charged the jury as follows:

"Now, so far as this alley is concerned, gentlemen, I have charged you that it need not be a dedicated or public alley, but if you shall find from the evidence beyond a reasonable doubt, that it is used by people, whoever desire to use it when they want to, and you find it to be an alley under this evidence, that is a sufficient compliance with this statute that these screens shall not obscure the view from the alleys or streets or the sidewalks. The object of this law, gentlemen, is that the officers of the town, and not only that, but every person in town—it is the privilege of every man or woman in the town passing along any street or sidewalk or alley, where they have a right to be, that they shall have an unobscured and unobstructed view into a saloon through the windows, if there are windows, so as to see whether or not the business is being carried on contrary to law. That is the object of it."

We think this instruction sufficiently guarded the rights of the respondent. The purpose of the statute is very clearly stated by the learned circuit judge, and under this instruction the respondent could not have been found guilty of the offense unless the jury was satisfied beyond a reason-

able doubt, that it was a public alley in the sense that it had been thrown open to the public for general use.

We think it is not incumbent upon the prosecution on the trial of a case of this character to show the dedication of the street or alley, but that it is sufficient if the fact appear that it is at the time open to the use of the general public.

The conviction will be affirmed and the circuit judge directed to proceed to judgment.

GRANT, J. did not sit. McGRATH, C. J. took no part in the decision. LONG and HOOKER, JJ., concurred.

PEOPLE v. PARSONS.

(Supreme Court of Michigan. April 30, 1895.)

Prosecution for larceny—Evidence—Character of letter—Remarks of recipient—Instructions—Presumption of innocence.

1. Defendant shipped to K a package containing the bonds alleged to have been stolen by him, and also wrote a letter telling K what to do with the package, which letter K claimed had been destroyed as requested therein. *Held*, that what was said by K to his office associates in regard to the disposition of the package, and what had occurred on the receipt of the package, was admissible as bearing on the character of the letter K received.
2. Defendant's statements made to a police officer are admissible when it appears that defendant volunteered the statements, and that no threats or inducements were held out to him.
3. Where larceny from a vault was alleged to have been committed on the 4th, evidence of the condition of the vault on the morning of the 6th, when the larceny was discovered, is admissible.
4. Where the jury were instructed that they must be satisfied beyond all reasonable doubt that defendant committed the offense charged, he was not prejudiced by an omission to charge that defendant is presumed to be innocent, the court having stated in the presence of the jury that nothing could be presumed against defendant.
5. On a trial for the larceny of bonds, where there is no contest as to their ownership or genuineness, it is sufficient to prove that they were taken without the consent of the surviving partner of the firm to whom they had belonged, or of the person who had the actual possession, without showing that no consent was given by the executors of the deceased partners.
6. Instructions requested need not be given in the language of the requests, provided their substance be given, so far as correct.
7. An instruction that, if P and K were associated in planning and perpetrating the crime, that fact would not make P the less guilty because K was guilty, is correct when the facts disclosed by the record justify the instruction.

Error to circuit court, Saginaw county; Eugene Wilber, judge.

Newell B. Parsons was convicted of larceny, and appeals. Affirmed.

Dan P. Foote and Trask & Smith, for appellant. Fred A. Maynard, Attorney General, and E. A. Snow, prosecuting attorney, for the people.

MCGRATH, C. J. Respondent was convicted of the theft on the 4th of April, 1894, from a vault in the office of Wells, Stone & Co., at Saginaw, of 463 bonds, of the value of \$1,000 each, issued by the Cincinnati, Saginaw & Mackinac Railroad Company. A. W. Wright, F. C. Stone, and C. W. Wells had composed the copartnership of Wells, Stone & Co. Stone and Wells had died. A. W. Wright, of Alma, and B. E. Wells, of Duluth, were Wells' executors, and A. W. Wright and E. P. Stone and Harriott F. Stone were Stone's executors. The business was being continued by Wright on behalf of all, Edwin P. Stone having charge thereof. Wright, the estate of Wells, and the estate of Stone owned the bonds. Respondent was at the time, and had been for a number of years, the trusted bookkeeper of the firm. He had assisted in clipping the January coupons from the bonds, and knew that the bonds were kept in a tin box in the vault. He had the combination, a key to the inner door of the vault, and a key to the tin box. On the morning of the 6th of April the attention of the proprietors was called by Parsons to the condition of the vault; to the fact that the combination lock had been removed from the outer door of the vault, and that certain books and vouchers which were in the vault on the day before had been taken. It was at this time that the loss of the bonds was discovered. The people's evidence tended to show that the bonds had been sent by Parsons, by express, to one Knight, at Grand Rapids, with instructions, by mail, to "deposit them in two safety deposit vaults, where they could not be found, and wire me;" that Knight received the bonds, placed them in one safety deposit vault, and, after the arrest of Parsons, exposed the whole matter, when the bonds were recovered. The defense was that Knight and Parsons had been very intimate; that Knight had frequently visited Parsons, at Saginaw, and, upon such visits, Knight stopped with Parsons, at the latter's home; that, in the latter part of February, Knight spent two or more days at Saginaw, and, on the night before his departure, brought a package to Parsons' house, and on the next morning, representing that he had too much to carry, left the package with Parsons, to be forwarded to him when requested; that, on the 3 of April, Parsons received a letter from Knight requesting him to forward the package to him by express; and that, on the 4th of April, Parsons forwarded the package, innocent of its contents. Knight claimed that he had destroyed the letter he received with the package, agreeably to the instructions contained therein, and Parsons claimed that he had lost the letter sent him by Knight, requesting him to forward the package.

A juror was challenged by the prosecuting attorney, and excused by the court. The record discloses the examination of the juror, the challenge, and the fact that he was excused, but contains nothing tending to show that respondent was prejudiced thereby.

Knight testified that he was at the time in the employ of Houseman, Donnelly & Jones; that the package was received in his absence; that when he came in the parcel boy held up the package, and notified him of its receipt; that he then told the boy to open it; that his attention was then called by the cashier to a letter which had been received for him; that he recognized the handwriting upon the letter, opened it, and read it hurriedly, and then told the boy not to open the package, but took it, and left the office. The cashier and the bundle boy were called, and testified to what had occurred upon the receipt of the package, agreeing substan-

tially with Knight. Error is assigned upon the admission of this testimony, but the testimony related to what occurred on the receipt of the package, rather than to the conversation. It bore upon the character of the letter which Knight had received.

Error is assigned upon the receipt of the testimony of the police officer as to admissions made by respondent. In response to questions the officer stated: That no promises or inducements were held out by him. That no threats were made, and that the statements made by respondent were voluntary. That "I told him I did not come there to get any information from him. He started to give me some, and I told him he had better go to Mr. Stark (attorney for Wells, Stone & Co.), and talk with him. I told him he was under no obligations to tell me anything, and I did not want any information. I asked him for the key to his desk. He wanted to know what I wanted of it. I told him I was going to look through his desk. He said I would not make anything by that. I told him I was ordered to get the key, and go look through his desk, and he said to me to see his mother; she would give the key. I told him, 'Why do you not talk with some of the company, and avoid all this trouble and notoriety?' and he said they had not given him any chance. 'Why,' I said, 'I supposed they had.' He says, 'No; they haven't said anything to me at all.' I said, 'Why do you not send for Mr. Stark, and talk to him?' 'Why,' he says, 'he ought to come and talk with me.'" No testimony was offered by defendant bearing upon the question of the admissibility of the statements made to the officer. The testimony of the officer upon that point must be considered as a whole, and we think it sufficiently appears that respondent volunteered the talk, to warrant the admission of the testimony; that it was suggested to him that he should do this talking with the attorney for his employers, and that he was under no obligations to talk with the witness. And the only suggestion that savors of possible advantage was one that he might, by talking with the attorney, not with the witness, avoid trouble and notoriety.

Although the theft was alleged to have been committed on the 4th of April, it was entirely proper to show the condition of the vault on the morning of the 6th, when the proprietors were telephoned for by the defendant; that upon their arrival they found the bonds gone, together with the books and vouchers; and that the combination lock had been taken from the vault door.

The court was requested to instruct the jury as follows: "(1) The defendant is charged with the crime of larceny. Larceny consists of distinct elements. First, the unlawful and felonious taking; second, the carrying away; third, the goods of another; fourth, with the intent to convert the same to his own use; fifth, and the taking and carrying away must be without the consent of the owner. To convict upon this charge, each element of the crime must be proved beyond a reasonable doubt. (2) Where a reasonable doubt is entertained by any one juror upon any one of the elements constituting the crime, the defendant must be acquitted. (3) Where the property is charged and shown to belong to several owners, the people must show, beyond a reasonable doubt, the non-consent of all the alleged owners. (4) In a criminal prosecution, nothing can be presumed against the defendant. The people must prove, beyond a reasonable doubt, the existence of every element and condition constituting the crime charged. (5) The non-consent of each of the several owners of the

property alleged to have been taken is a necessary element of the crime, and must be proved, like every other element of the crime, beyond a reasonable doubt. (6) It is not for the defendant to prove the consent of the several owners, but for the people to prove the non-consent of the owners, and all of the owners, where there are several owners, beyond a reasonable doubt. (7) It is necessary for the people to prove, beyond a reasonable doubt, at least the *de facto* existence of the railroad company issuing the bonds alleged to have been stolen. (8) And the people must prove, beyond a reasonable doubt, that the bonds in the case were the genuine bonds of the company; that is, that the signatures of the president and secretary, by which the bonds are signed and authenticated, are the genuine signatures of the persons whose names are signed thereto as president and secretary. (9) The defendant is presumed to be innocent of the offense charged, and that presumption is a complete shield until the people have introduced evidence to the jury, beyond all reasonable doubt, that he is guilty; that is, the jury must be satisfied, beyond all reasonable doubt, after properly considering all the evidence, that the defendant has committed the offense charged, before the jury can lawfully find the defendant guilty. (10) A reasonable doubt is based on reason and common sense, and grows out of the testimony in the case. It is such a doubt as will leave one's mind, after a careful examination of all the evidence, in such a condition that he cannot say that he has an abiding conviction, to a moral certainty, of the defendant's guilt. (11) Where circumstantial evidence alone is relied upon, every material circumstance or link in the chain of testimony must be proved beyond all reasonable doubt. * * * (12) If any one of the jurors, after a fair and careful consideration of all the evidence, has a reasonable doubt, based either on the evidence given, or a failure of evidence upon any material element of the offense, he should not find the defendant guilty."

The court instructed the jury as follows: "Before the defendant can be found guilty, the jury, and each member of it, must be satisfied of his guilt, beyond a reasonable doubt, and this applies to each element of the crime. The term 'reasonable doubt' is so clear in itself, and so well expresses its own meaning, that any attempt to define it would seem unnecessary; but I have been requested by counsel for defendant to charge you, and I do so charge you, that a reasonable doubt is based on reason and common sense, and grows out of the testimony in the case. It is such a doubt as will leave one's mind, after a careful examination of all the evidence, in such a condition that he could not say that he has an abiding conviction, to a moral certainty, of the defendant's guilt. * * * Where circumstantial evidence alone is relied upon, every material circumstance or link, of the chain of testimony must be proven, and beyond a reasonable doubt. I do so charge you. The circumstances relied upon must not only be consistent with his guilt, but inconsistent with his innocence; and this applies to each link in the chain, for the chain itself is no stronger than the weakest link in it. * * * Larceny has been defined to be the felonious taking and carrying away by any person of the goods and personal property of another, with the felonious intent of converting it to his own use and making it his own property, without the consent of the owner,—the word 'felonious' meaning that he has no color of right or excuse for the act. The intent must be, not to deprive the owner temporarily, but permanently, of his property. * * * According to all definitions, there must be a taking and carrying away: it must be with

felonious intent; it must be the personal goods of another; and it must be without the consent, and against the will, of the owner. * * * *

It has been contended here by counsel for the defendant that the proof is insufficient that consent to take those bonds was not given by the owners.

Upon that point, gentlemen of the jury, I charge you, that you may consider the entire evidence in the case, including that of the defendant, in determining whether or not consent was given by the owners. If the bonds were Wells, Stone & Co.'s then upon the death of Wells and Stone the legal title and the right to the custody of bonds passed to Ammi W. Wright, as the living, surviving partner. The interest of the executors was equitable only, and they could not take the bonds from the possession of Ammi W. Wright, or authorize it to be done. If it appears that the actual possession was in E. P. Stone, and the constructive possession was in Ammi W. Wright if neither of them authorized the removal of the bonds, in the absence of any other evidence tending to show the contrary, that evidence, in the opinion of the court, is sufficient that the removal was unauthorized, and I so charge you, as a matter of law. I am requested by the defendant to charge you that it is necessary for the people to prove, beyond a reasonable doubt, at least the *de facto* existence of the railroad company issuing the bonds alleged to have been stolen, and I so charge you; but upon that point the people have given evidence tending to show that the Cincinnati, Saginaw & Mackinac Railroad Company was completed from Durand to some point beyond Bay City, in this State, several years ago, and that it was equipped with rolling stock, and has actually been doing business for some years past as a railroad company. This fact alone is sufficient proof that it is a *de facto* corporation, at least. I am also requested by the defendant in this case to charge you that the bonds in this case must be shown to be genuine bonds of the company, and I do so charge you; but upon that point, if you find that the testimony of Ammi W. Wright, who claims to have been acting as the president of the railroad company, is true, in regard to the issuing of the bonds, and the testimony of Mr. Knowlton in regard to their delivery, and the other evidence produced by the people upon that point, then I charge you that such, if you believe it to be true, is sufficient to show that these bonds were legally issued, and that they were genuine, and would be the subject of larceny, if stolen. * * The defendant, of course, is not bound, by his defense, to show how the bonds were taken, or who took them."

It is clear that respondent's first, second, seventh, tenth, eleventh, and twelfth requests were given. The first paragraph of the fourth request and the first paragraph of the ninth were not given, while the other portions of these two requests were actually given. It appears from the record that the fourth request was read in the presence of the court and jury, and there discussed, till counsel was told there was no necessity for further argument upon that request, that it clearly stated the law, and that the court would so instruct the jury. It is true that the court, in the charge to the jury, said, referring to the general discussion by counsel, "You may or you may not have formed an opinion from that discussion in regard to what the law of the case is; but it a part of the duty to take the law, not from the arguments of the counsel, or from their own opinion, but from the court." The opinion, however, respecting the fourth request, was that of the court, and not of the counsel.

Respecting the ninth request, it would seem that counsel, in framing it regarded the second paragraph as the equivalent of the first. The reason

why the jury must solve all reasonable doubts in favor of the accused is that the presumption of innocence is with respondent. The burden is upon the people to overcome that presumption of innocence by proof that will convince the jury, beyond all reasonable doubt, of respondent's guilt. The case should not be reversed simply because the court has failed to give the reason why such burden is imposed upon the people. Where neither instruction has been given, it would be error; but where the jury has been instructed that they must be satisfied, beyond all reasonable doubt, that the defendant has committed the offense charged, it cannot be said that the respondent has been prejudiced by an omission to charge that the defendant is presumed to be innocent, especially as the court has already stated, in the presence of the jury, that in a criminal prosecution nothing can be presumed against the defendant.

Respecting the fifth, sixth and eighth requests, there was no contest over the ownership of the bonds, or as to their genuineness, and no claim that they were taken by authority. Knight insists that he received them from Parsons, inclosed in a wrapper, in ignorance of the fact that the wrapper contained stolen bonds. Parsons claimed that he received the package from Knight, and that he was innocent as to what it contained. The theory of each was that it had been stolen by the other. Both denied having taken it from the vault. The bonds were offered and received in evidence without objection. They purported to have been duly and properly executed. Wright testified to their issue and value, and that he signed them as president of the railroad company. They were taken from the vault of Wells, Stone & Co. Wright was the survivor of that firm. Stone had charge of the business. Each testified that the bonds had been taken without his consent. A co-executor lived at Duluth, and another at Saginaw. Neither had anything to do with the management of the business. Suppose that an express train had been held up, the expressman bound and gagged, and \$50,000 in money taken, and that a posse pursued and captured a masked pad with the money in his possession. Would it be necessary, upon the trial, in addition to proof that the express messenger was in the employ of the express company, and had charge of the stolen money, to show that the agent sending, the agent to whom consigned and the president of the company, had not consented to the taking? It would seem not.

It was shown upon the trial that said railroad corporation had been operating its road for some time, and had issued the bonds in question. The respondent was not prejudiced by the instructions given upon these subjects. But as to some of the requests already referred to, and others which were refused, counsel for respondent do not, in their briefs, suggest in what respect the instruction given differs from the requests, nor attempt to point out wherein the requests were not covered by the general charge; and the only point urged respecting them is that the respondent was entitled to have them given in the very language in which framed, subject to the sole proviso that the instructions stated the law correctly, and that there was evidence to support them. We do not understand this to be the true rule. In *Fisher v. People*, 20 Mich., 135, it was held that the refusal of a specific request, although correct, is not error, if the written charge actually given fairly leaves to the jury the question substantially raised by the request. In *Leonard v. Pope*, 27 Mich., 145, it is said that it is not error to refuse to repeat, on separate requests, charges already fully given in an intelligible form. In *People v. Marvin*, 29 Mich., 31, it is

said, that requests to charge may properly be declined when the points involved have already been covered. In *Hoyt v. Jeffers*, 30 Mich., 181, it was held that the refusal of requests to charge is not error, where their substance is embodied in the general charge. In *Sword v. Keith*, 31 Mich., 247, it was held that a party is entitled to have specific charges upon the case applicable to each of the various hypotheses or combinations of facts which the jury, from the evidence, might legitimately find, and which have not been covered by other instructions. This rule has been followed in a multitude of cases. Indeed, it has been reiterated in almost every volume of our Reports. Some of the later cases are *O'Callaghan v. Boeing*, 72 Mich., 669, 40 N. W., 843; *Cooper v. Mulder*, 74 Mich., 374, 41 N. W., 1084; *People v. Jacks*, 76 Mich., 218, 42, N. W., 1134; *Babbitt v. Bumpus*, 73 Mich., 331, 41 N. W., 417; *Shearer v. Middleton*, 88 Mich., 621, 50 N. W., 737; *People v. Hubbard*, 92 Mich., 322, 52 N. W., 729; *Stevens v. Pendleton*, 94 Mich., 405, 53 N. W., 1108; *Roux v. Lumber Co.*, 94 Mich., 607, 54 N. W., 492; and *Ellis v. Whitehead*, 95 Mich., 105, 54 N. W., 752. Language seemingly inconsistent with this rule must be held applicable only to the circumstances of the case in which used.

The circuit judge, upon his own motion, instructed the jury that, if they were satisfied from the testimony that if Parsons and Knight were associated in planning and perpetrating the crime, that fact would not make Parsons the less guilty because Knight was guilty also. We think that the facts disclosed by the record fully justified this instruction. The judgment is therefore affirmed.

GRANT, J., did not sit. The other justices concurred. (63 N. W. Rep., 69.)

PEOPLE v. LIPHARDT.

(Supreme Court of Michigan. April 16, 1895.)

Cross-examination of witness—Bribery.

1. Where, in a trial for bribery, the testimony of a State's witness showed that he had instigated another to advise defendant to sell his vote, and had then concealed himself with officers for the purpose of detecting the same, defendant could cross-examine as to witness' connection with the case, and the names of all who were concerned in the alleged detection.
2. One who has actually accepted a bribe cannot excuse his act on the ground that it was instigated by others for the purpose of entrapping him.

Error to recorder's court of Detroit; William W. Chapin, judge.

William Liphardt, convicted of receiving a bribe, appeals. Reversed.

Thomas J. Navin and Edwin Henderson (George Gartner, of counsel), for appellant. Allan H. Frazer, prosecuting attorney, and Henry A. Mandell, assistant prosecuting attorney, for the people.

HOOVER, J. The defendant was convicted of receiving a bribe upon an agreement to vote for the adoption of a certain school seat at a prospective meeting of the board of education of the city of Detroit, of which board he was a member. The outline of the case as claimed by the people, is that the Manitowoc Seating Company, a corporation, through its agent, one Atcherson, was a competitor for the contract for seats to be purchased. Atcherson had a conversation with one Davis, a member of said board of education, in which Davis had said that, if Atcherson would give the defendant \$100, of which \$25 was to be paid in cash in advance, and the other \$75 after the contract was signed, the defendant would vote for Atcherson's desk at the next meeting of the board. Atcherson thereupon informed the mayor that there was crookedness upon the part of some members of the board, and he expressed a desire to detect it, and caused certain members of the police department to confer with Atcherson about it. A room was secured by Atcherson adjoining his own in the hotel, and some officers and a stenographer were placed therein, to overhear an interview in Atcherson's room when it should occur. Holes were made in the walls between the two rooms to aid in hearing and seeing what should take place. An interview was had, in which the witnesses testify that the arrangement was stated by the defendant as understood by him, in conformity to the arrangement with Davis, above mentioned and Atcherson then and there paid him and he received \$25 in money upon his promise to vote for Atcherson's seat. The defendant denied that he had any such interview, and sought to prove an *alibi* which was substantially all of the material testimony offered in his behalf, but in this court most of the questions arise upon the rather inconsistent theory that he was decoyed into the commission of the act through a conspiracy between Atcherson, the mayor, and the police. Some 70 assignments of error appear in the record, and we cannot conveniently discuss each separately, but will refer to the more important only.

Atcherson was the main witness for the people, and testified to most, if not all, of the principal facts relied upon by the prosecution. His credibility as a proper subject for investigation by cross-examination. The defense should have been permitted a full and searching cross-examination in relation to all that he did in connection with the affair, and were entitled to go into his relations with all who appeared, or could be shown to be connected with the transaction. He testified that he had "figured on a scheme in his mind to detect them, for he knew that they would come to him with a proposition." He said that upon his arrival three months before this transaction, a man, not a member of the school board, talked with him, and asked what he would give to secure the contract. He declined to state his name, as he said it had no connection with the matter. The court refused to compel an answer. He testified that he was satisfied from what was said to him that he would not be prosecuted, and that the mayor made him a promise of similar nature within 48 hours before the event. He said that he talked with him concerning what he was going to do, and told him "all he had discovered, the whole story from beginning to end." He was asked if he understood or was told that, if they resigned, they would not be arrested for this transaction, and his answer was excluded under objection and exception. The court was in error in these rulings, as the defendant's counsel were entitled to all the facts that led up to this transaction, including the interviews with the mayor and police officer in relation to the proposed detection of bribery,

and the names of all that had to do with it; not that it necessarily tended to establish a conspiracy, but that it might show one, or, at all events, might bear upon the credibility of Atcherson's story, and perhaps furnish the means of refuting it. The testimony of Atcherson may fairly be said to show that he encouraged Davis to advise Liphardt that he would accept a proposition from Liphardt to sell his vote for \$100; that he informed the mayor of this; and that the mayor was willing to aid in detecting the defendant, if he should make such proposition; and that he caused the officers to interest themselves in the matter. It is contended that this was a conspiracy to cause crime to be committed, and that it was criminal on the part of all concerned, and the court was asked to so instruct the jury, which he declined to do. The defendant's counsel claimed that the defendant had no intention to commit this offense until it was suggested by Atcherson, under his arrangement with the mayor to detect "boodling" by members of the board. It was also claimed that the mayor vetoed a resolution of the board selecting another seat, to give an opportunity for this scheme to be carried out, and that the mayor's interest in the matter arose from a desire for vacancies upon the board, that he might fill the same by appointment. It was also said that, if these things were true, the defendant could not be convicted of the offense, for the reason that he was induced to commit the act, and did not himself originate the plan. Whether defendant's claim was true, could only be determined by the jury. He had the right to show the facts by evidence in his own behalf, or by cross-examination as bearing upon the credibility of Atcherson and other witnesses. We know of no case that holds that one who has committed a criminal act should be acquitted because induced to do so by another. It is merely when the criminality of the act is shown to be absent by the fact of the inducement that such proof justifies acquittal. In cases of alleged larceny, where the master has directed a servant to deliver his property to a thief, or burglary, where he has directed the admission of the burglar, the principal element of the offense is lacking; in the former there is no felonious taking, in the latter no felonious breaking and entering. The doctrine is stated in 1 Bish. Cr. Law (2d Ed.), §§ 344, 345. The author says: "The cases of great difficulty are where one, suspecting crime in another, lays a plan to entrap him; so that, even if there is consent, it is not within the knowledge of him who does the act. Here we see, from the principles already discussed, that, supposing the consent really to exist, though unknown to the other, no legal crime is committed. But exposing property, or neglecting to watch it, under the expectation that a thief will take this property, or furnishing other facilities or temptations to such a wrongdoer or to any other, is not a consent in law. A common case is that of burglars, who, intending to break into a house and steal, tempt the servant of the occupant to assist them, and the servant, after communicating the facts to his master, is authorized to join them in appearance. Under such circumstances, clearly the burglars are not excused for what they personally do. But it seems, if the servant opens the door while they enter, they are not to be held criminally for this breaking. Yet, if he opens it at their request, why should they not be held, he being deemed their agent for this purpose, rather than the master's? An Irish case appears to go further than this query, for it even decides that, where persons intending to commit burglary knock at the door of the prosecutor, who, apprised of their purpose, and prepared for them, himself opens it, and on their rushing in and locking

the door seizes them, and secures them, the offense of burglary is committed. And the doctrine as to the breaking seems to be that a consent to it, obtained by fraud or by force, avails not the defendant. Also, according to the decision of North Carolina, if one delivers an article to his slave, and then stands by to detect a person trading for the article with the slave, contrary to the act of 1817, this circumstance does not make the trading lawful." "But where the master goes further, and, instead of merely attempting to detect a crime already contemplated, directs his servant to deliver property to a supposed thief, who had not formed the particular design to steal it, this latter person, taking it with felonious intent from the servant, commits not a larceny." But in this case there is no opportunity for the claim made. If the facts were shown as stated, the defendant cannot excuse the receipt of money as a consideration for promised official action, merely because he was solicited by Atcherson, even if it were done at the instigation of the officers of the city, who have no rights to compromise public justice in any such way. *People v. Laird* (Mich.), 60 N. W., 457.

We think it unnecessary to review the several alleged errors upon the requests. There were many of them; among them one that the mayor and Atcherson were guilty of criminal conspiracy; and it is apparent that the policy of the defendant's counsel was to attack the mayor and Atcherson. There was no occasion for this further than to develop the facts in the case tending to throw light upon the conduct and motives of Atcherson or other witnesses, whose credibility was for the jury. The people as well as the defendant should have the right to have the vital questions in the case submitted to the jury without being complicated by irrelevant requests to charge. If this defendant committed the offense charged, public interests demand his conviction, and it was unnecessary to determine in this case whether the acts of the mayor and Atcherson amounted to a criminal offense or not. Their relation to the case was a proper subject of inquiry and discussion for one purpose only, viz., that of ascertaining whether the defendant was guilty of bribery or not. For the undue restriction of cross-examination we feel constrained to reverse the cause. A new trial is therefore directed.

LONG and MONTGOMERY, JJ., concurred with HOOKER, J. McGRATH, C. J., concurred in the result. GRANT, J., did not sit. (62 N. W. Rep., 1022.)

PEOPLE v. WARNER.

(Supreme Court of Michigan. March 12, 1895.)

Forgery of check—Fictitious payee—Effect—Voluntary confessions—Instructions—Necessity of request.

1. Where one count of an indictment charges forgery of a check therein set out, and the other count charges the uttering thereof, it is proper to refuse to compel the State to elect under which count it will proceed.
2. It appeared that defendant, who bore an assumed name when arrested, confessed when the sheriff confronted him with his true name, and afterwards told the sheriff that he should plead guilty, and that the sheriff replied that in that case he would speak to the judge and get defendant off as easy as possible. *Held*, that a charge that confessions must be made voluntarily, and that if defendant made them under undue influence they could not be considered, was sufficiently favorable to defendant.

3. Where, on a trial for forgery, defendant's counsel did not request the court to define "false" and "forgery," and to caution the jury that defendant's failure to testify was not evidence of guilt, defendant cannot complain of the court's failure to do so.
4. Though the names of both the drawee and the payee of a forged check be fictitious, the false making of it with intent to defraud constitutes forgery.

Error to circuit court, Alcona county; William H. Simpson, judge.

Frank Warner, convicted of forgery, brings error. Affirmed.

The respondent was charged with forgery. The information contains two counts. The first count charges the forgery of an order for the payment of money, which reads as follows: "East Tawas, Mich., March 13, 1893. J. H. Schmeck & Co., Bankers: Pay to the order of George Demming (\$87.00) eighty-seven dollars. R. J. Norton." The second count charges the uttering. The respondent was arrested by the sheriff with the order in his possession, and attempting to pass it and get money upon it. The firm of Schmeck & Co. had failed some time before. The respondent went to the store of one Piser, wanted to buy some goods, and offered the check. Mr. Piser did not know the respondent, nor any of the parties named in the check. He went into a barber shop near by to ascertain if the check was good. The day after his arrest the sheriff went to Lewistown, to see if he could find such a man as R. J. Norton or George Demming, or R. J. Norton's camp, where respondent said he had been working all winter. On his return the sheriff asked him if his name was not Frank Warner, to which he replied, "Yes;" and the sheriff testified that "he cried; broke down; said he had forged the check, and expected to get a trip for it." In a subsequent conversation with him the sheriff testified, on cross-examination, that the respondent told him that he should plead guilty, to which the sheriff replied that, if he was going to plead guilty on his own responsibility, he would speak to the judge, and get him off as easily as possible.

Fred A. Maynard, Attorney General, and *O. H. Smith*, prosecuting attorney, for the people. *Henry K. Gustin* (*James McNamara*, of counsel), for respondent.

GRANT, J. (after stating the facts). 1. The court did not err in refusing to compel the prosecution to elect under which count it would proceed. *Van Sickle v. People*, 29 Mich., 61; *People v. Kemp*, 76 Mich., 421, 43 N. W., 439.

2. The evidence did not establish the fact that the confession to the sheriff was obtained by duress. There was no evidence of any duress or promises at the time the confession was made. It was competent evidence. The court instructed the jury that confessions or admissions must be made voluntarily, and that, if they found that they were made by the respondent under undue influence, they could not be considered. This was as favorable an instruction as the respondent was entitled to.

3. Error is alleged in that the court failed to instruct the jury as to the presumption of innocence, to explain the meaning of the words "false" and "forged," and to caution them that the fact that the respondent did not testify in his own behalf was not evidence of guilt. We are unable to understand what counsel mean by asserting that the court did not instruct

the jury upon the presumption of innocence. The judge explicitly charged them upon this point as follows: "The defendant is entitled to the benefit of all doubts. When he enters the trial, he has the right to stand before you as an innocent man, until the people have produced evidence sufficient to overcome the presumption of innocence, and force you to believe, and convince you beyond a reasonable doubt, that he is guilty; and after hearing all the evidence in the case, if, by looking it over and considering it, you could find any other way whereby it could be construed consistent with his innocence, it is your duty to do so,—that is, after looking at the evidence and considering it, if it can be so construed and passed upon as to be consistent with innocence, it is your duty to give him that right. In other words, before you can convict him the evidence must be such that convinces you beyond a reasonable doubt, and overcome every presumption of innocence, when most favorably construed in his favor." As to the other points, it is sufficient to say that the attention of the court was not called to them by the respondent's counsel.

4. It is next argued that the names to the order were fictitious, and therefore the crime of forgery was not committed. The common law definition of "forgery" is "a false making, or a making *malò animò* of any written instrument with intent to defraud." The present case is clearly within this definition. The authorities, moreover, lay down the rule as follows: "Signing fictitious names, or the names of non-existing firms or persons, to an instrument, with an intention to defraud, is a false making, and constitutes forgery." 8 Am. & Eng. Enc. Law, 471, and authorities there cited. The judgment is affirmed. The other justices concurred. (62 N. W. Rep., 405.)

PEOPLE v. WENZEL.

(Supreme Court of Michigan. April 16, 1895.)

Statutes—Implied repeal—Sale of liquors.

After the passage of act 1887, which is a general law regulating the sale of liquor, and therefore repealed the provision of the charter of the city of Kalamazoo authorizing the city to regulate the sale of liquor, the legislature passed an act, in 1889, for the purpose of amending the charter of the city so as to enable it to regulate street parades, and apparently in order to comply with the constitutional provision requiring amendments to be made by a reenactment of the section amended, the subdivision empowering the city to regulate the sale of liquor, as well as the other subdivisions of that section, was reenacted in the same words as used in the original section. *Held*, that the reenactment of the subdivision in regard to the sale of liquor did not impliedly repeal the general law, and authorize the city to regulate such sales.

Error to circuit court, Kalamazoo county; George M. Buck, judge.

Adam Wenzel was convicted under a city ordinance of unlawfully selling liquor, and brings error. Reversed.

Frank E. Knappen and *E. M. Irish*, for appellant. *Geo. P. Hopkins*, city attorney, for the people.

HOOKE, J. The defendant was convicted of liquor selling under a city ordinance which imposed a penalty for engaging in the business of selling intoxicating liquor within the city of Kalamazoo without first obtaining a license from the city authorities. The validity of the ordinance is attacked. The city charter was amended in 1883, and section 24 of chapter 17 of that act prescribed the "powers and duties of the city council." This section contained 44 subdivisions, and in these were contained most, if not all, of the subjects upon which the council was given authority to act. Subdivision 25 was as follows: "Twenty-fifth, to provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, flour, meats, and other provisions; to regulate and license all taverns and houses of public entertainment, all saloons, restaurants, and eating houses." In 1887 the act regulating the traffic in liquor was passed, and it is contended that it effected the repeal of subdivision 25 of this charter. This question, as applied to an ordinance of the city of Adrian, was before us in the case of *People v. Furman*, 85 Mich., 110, 48 N. W., 169. In that case the defendant was convicted of violating the ordinance against keeping saloons open upon Sunday. The charter was passed at the same session, before the general liquor law. It authorized the council to "require all ale, beer and porter houses, and all places of resort for tippling and intemperance to be closed on the Sabbath day." Under this provision the ordinance was enacted. It was held, Mr. Justice Grant speaking for the court, that the subsequent act was designed to remove from cities all power of regulation under existing charters, except that of regulating the hours for opening and closing of saloons, which that act expressly gave to the common council, boards, etc., of all cities and incorporated villages; and that "this provision limits the power of municipalities in legislating as to the time within which saloons may be kept open, and excludes any intention on the part of the legislature to confer upon them any further power to legislate upon the subject. The act expressly repeals all acts or parts of acts in any wise contravening or inconsistent with its provisions. It is clear, therefore, that it was the intention of the legislature to provide a uniform rule, applicable to all alike, for the conduct of this business. The ordinance in question is certainly inconsistent with the provisions of this law. We are therefore of the opinion that this case is not within the rule of *People v. Hanrahan*, and that the liquor act repealed the ordinance in question, and the charter of the city of Adrian, in so far as they assume local legislation over the liquor traffic." This decision is applicable to the charter of Kalamazoo, and repealed subdivision 3325 referred to. In 1889 the legislature again amended the charter of Kalamazoo, reenacting section 24. The only change made from this section, as passed in 1883, was in relation to street parades, provided for in subdivision 11. Section 24 was incorporated as originally passed. The question now arises whether the reenactment of subdivision 25 shows an intention to modify the general liquor law, as applied to Kalamazoo, repealing it, in whole or in part by implication.

It is a general rule that repeals by implication are not favored, especially where the effect is to repeal a special act by a general law. *End. St.*, §§ 210, 227, 228. Unless the legislative intent to repeal a charter is deducible from a subsequent general act, the law will hold that the charter is not repealed by implication, and presumes an intention to except the municipality from the operation of the general law. *Goldson v. Buck*, 15 East, 372; *Supervisors of Walworth Co. v. Village of Whitewater*,

17 Wis., 200; *Janesville v. Markoe*, 18 Wis., 350. These decisions have no application where the intent is plain. See *Prople v. Furman*, *supra*; *Kellogg v. Oshkosh*, 14 Wis., 623. They are cited to the proposition that a special enactment is entitled to certain presumptions, as against a general enactment, though the latter be subsequent in point of time. It would seem that this presumption could be no less where the special act is later, and that, if incompatible with a prior general act, a repeal of the latter by implication must be found; for otherwise the special enactment could not be given effect. *Sherlock v. Stuart*, 96 Mich., 193, 55 N. W., 845, was a case of that kind, and it was held, Mr. Justice Grant again writing the opinion that the effect of the subsequent special enactment repealed by implication the general liquor law of 1887, as applied to Grand Rapids, so far as the same was inconsistent with the special act. It was accordingly held that the city might grant or refuse licenses to sell liquor upon the ground of the fitness or unfitness of the proposed location, which we understand to have been the question in this case. The only reason assigned for a different holding in this case is that the amendment to the Grand Rapids charter changed the subdivision relied upon, while in the amendment to the Kalamazoo charter there was no change. It is argued that the change in the Grand Rapids charter clearly showed a legislative intent to alter the general law for the benefit of the locality, and that this is wanting in the present case. We are cited to a number of authorities which are said to support the proposition that, "where a statute merely reenacts the provision of an earlier one, it is to be read as part of the earlier statute, and not of the reenacting one, if it is in conflict with another passed after the first, but before the last, act; and therefore does not repeal by implication the intermediate one." *End. St.*, § 194, and cases cited; see also *Merrill v. Kalamazoo*, 35 Mich., 215; *Attorney General v. City of Detroit*, 71 Mich., 96, 38 N. W., 714. These last two cases are cited to the proposition that special charters are not to be construed to affect general legislation, or other special acts outside of the charter, without a clear intent to do so appearing. A comparison of the original and amended subdivisions of the Grand Rapids charter at this juncture may be of service. Local laws 1887, p. 494, subd. 55: "Fifty-fifth, to license and regulate the keepers of hotels, taverns, and other public houses, grocers, and keepers of ordinaries, saloons, and victualing and other houses and places for furnishing meals, food or drink." Local laws 1891, p. 505, subd. 55: "Fifty-fifth, to license and regulate the keepers of hotels, taverns and other public houses, grocers and keepers of ordinaries, and victualing and other houses or places for furnishing meals or food; to restrain, license and regulate saloons, and to regulate and prescribe the location thereof." The substantial change in these subdivisions is the insertion of the word "restrain" in the latter. It precludes the claim that this subdivision was included in the amendatory act by inadvertence. But in this case the obvious intention was to change the charter in regard to street parades by a change in one of the subdivisions of a long section, every other subdivision of which was incorporated in the new act without change, apparently under the provision of the constitution requiring amendments to be made by reenactment of the sections amended. In doing this it was easy to overlook the fact that subdivision 25 had been repealed by the general liquor law, and we think the case falls within the rule of construction contended for. The following cases recognize this principle: *Gordon v.*

People, 44 Mich., 485, 7 N. W., 69; *Curbay v. Bellemer*, 70 Mich., 106, 37 N. W., 911; *Attorney General v. City of Detroit*, 7 Mich., 92, 38 N. W., 714; *In re Bushey* (present term), 62 N. W., 1036. It follows that the ordinance is invalid, and the judgment must be reversed, and the prisoner discharged.

GRANT, J., did not sit. The other justices concurred. (62 N. W. Rep., 1038.)

PEOPLE v. WILLETT.

(Supreme Court of Michigan. April 26, 1895.)

Prosecution for murder—Attempt to commit rape—Sufficiency of information—Instructions—Presumptions of innocence.

1. A charge in a criminal case, in which the evidence was wholly circumstantial, that the jury should acquit "if a single circumstance proven is inconsistent with the guilt of the accused," was properly refused.
2. An information charging the crime of murder in plain and sufficient language is not defective because the crime of rape, in the alleged perpetration or attempted perpetration of which the murder was committed, is not charged in the language of the statute.
3. Charges that "the law presumes every man innocent of the crime charged, * * * and this presumption abides with him throughout the entire trial, and should be borne in mind at each successive step in your deliberations as to your verdict," and that the burden of proof rests on the prosecution to prove the guilt of the accused "beyond a reasonable doubt," were sufficiently specific as to the presumption of defendant's innocence.
4. When one count of an indictment charged that the defendant purposely overturned a boat in which he and the deceased were riding, throwing her into the river, and another count charged that he overturned the boat unintentionally, while committing or attempting to commit rape upon the deceased, it was proper for the court to charge the jury to notice the difference between the two theories of the prosecution.
5. Failure to give specific instructions for one who has not asked them is not error.

Exceptions from circuit court, Macomb county; James B. Eldredge, judge.

Alfred Willett was convicted of murder in the first degree, and appeals. Affirmed.

Turner & Crawford (Jerome W. Turner, of counsel), for appellant.
John A. Weeks, prosecuting attorney (*Byron R. Erskine*, of counsel), for the people.

MCGRATH, C. J. Respondent was convicted of murder in the first degree. The theory of the prosecution was that respondent, who was of the age of 16 years, invited the decedent, a female of 21 years of age, to take a boat ride with him in the evening, just before sundown; that, before going, he made the threat that he would either have intercourse with the girl before they returned, or the girl would have to swim; that he was seen early in the evening, when near the shore, by several parties, exposing his privates to the girl, and trying to take improper liberties with her person; that she resisted, and wished to be taken ashore; that

he replied that she would have to submit or swim; that, between 9 and 10 in the evening, a controversy was heard to take place in the boat; she was at first heard to squeal, as the witness expressed it; that it continued for half an hour, she getting more emphatic; that he was heard several times to say, "Let go my arm," and "Shut up;" that afterwards a splash in the water was heard, and both were taken from the water. Respondent kept afloat. The girl, however, sank, and all efforts to resuscitate her were unavailing.

One of the counts in the information averred that the said Alfred Willett, on the 2d day of July, 1894, at the city of Mt. Clemens, in said county, in and upon one Nellie Jessie Van Zant, feloniously, willfully, and of his malice aforethought, did make an assault, and her, the said Nellie Jessie Van Zant, did then and there push, shove, throw, and precipitate into the waters of the Clinton river, there situate, wherein, etc. A second count charged that the said Alfred Willett, in and upon the said Nellie Jessie Van Zant, feloniously, wilfully, and of his malice aforethought, did make an assault, and her, the said Nellie Jessie Van Zant, then and there, feloniously and against her will, did ravish and carnally know, and that the said Alfred Willett, while then and there engaged in perpetrating the crime of rape upon the person of the said Nellie Jessie Van Zant, in a row boat on the waters of the Clinton river, in said county, did then and there, willfully, feloniously, and of his malice aforethought, overturn, upset, and capsize said row boat, and by means whereof the said Nellie Jessie Van Zant was thrown and precipitated into the waters of said river, and was suffocated and drowned. A third count, that the said Alfred Willett, in and upon the said Nellie Jessie Van Zant, feloniously, willfully, and of his malice aforethought, did make an assault, and did then and there perpetrate the crime of rape upon the person of the said Nellie Jessie Van Zant, in a row boat on the Clinton river, in said city; and the said Alfred Willett then and there, while so engaged in perpetrating the crime of rape upon the person of the said Nellie Jessie Van Zant, did, feloniously, willfully, and of his malice aforethought, overturn, upset, capsize said rowboat, and by means whereof the said Nellie Jessie Van Zant was thrown and precipitated into the waters of said river. A fourth count, that the said Alfred Willett, in a certain row boat, on the waters of Clinton river, in said county, in and upon Nellie Jessie Van Zant, feloniously, willfully, and of his malice aforethought, did make an assault, and her, the said Nellie Jessie Van Zant, then and there in said row boat, feloniously and against her will, did attempt to ravish and carnally know; and the said Alfred Willett, while then and there attempting to perpetrate the crime of rape upon the person of the said Nellie Jessie Van Zant, overturned, upset, and capsized the said rowboat, and by means whereof the said Nellie Jessie Van Zant was thrown and precipitated into the waters of said river, and by reason thereof inhaled large quantities of water into her lungs, by means whereof she, the said Nellie Jessie Van Zant, became mortally sick, and of such mortal sickness the said Nellie Jessie Van Zant then and there died. The assignments of error relate principally to the charge of the court.

Counsel for the defense made but a single request, which was as follows: "I desire the court to instruct the jury that the testimony in this case is wholly circumstantial, and when such is the case, if a single circumstance proven is inconsistent with the guilt of the accused, your duty is to acquit." We are referred to *People v. Stewart*, 75 Mich., 21, 42

N. W., 662, but the request which the court in that case held should have been given was: "If you have any reasonable doubt of the necessary facts or links constituting the chain of circumstances, then you should acquit." There is a distinction between the circumstances proven and a necessary link in the chain of circumstances.

It is next contended that the information is defective, in that the crime of rape is not sufficiently set forth therein. Section 9094, How. Ann. St., provides that, if any person shall ravish and carnally know any female by force or against her will, he shall be punished, etc.; and section 9095 provides that, if any person shall assault any female with intent to commit the crime of rape, he shall be deemed, etc. Section 9075 provides that "all murder which shall be committed in the perpetration or attempt to perpetrate any * * * rape * * * shall be deemed murder in the first degree." Section 9527 declares that, in all indictments for murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death was caused. Each of the counts contain the further allegation that "the said Alfred Willett, by reason of the premises aforesaid, and by means of the premises aforesaid, did then and there, feloniously, willfully, and of his own malice aforethought, kill and murder the said Nellie Jessie Van Zant," etc. In setting forth the manner or means by which the killing was done, the respondent has not been misled or prejudiced. The terms made use of leave no doubt as to the meaning. If the words "by force and against her will" have been omitted, other equivalent words have been used. The word "ravish" implies force and violence in the man, and want of consent in the woman, and the same may be said of the word "rape." *Herman v. Com.*, 12 Serg. & R., 69; *Com. v. Scannel*, 11 Cush., 547; *Com. v. Fogerty*, 8 Gray, 489; *Leoni v. State*, 44 Ala., 110; *State v. Daly*, 16 Or., 240, 18 Pac., 357.

The cross-examination of the witness Wood was entirely proper, in view of the fact that the witness had testified on direct that, "during the time he worked for me, I found him honest and clever in his work, and he always did what was right. He did nothing that was wrong in my presence."

The court instructed the jury that.

"In the beneficence of our modern statutes, in this State, one on trial for a crime is allowed to testify under oath in his own behalf. His interest in the result of the trial, that would formerly preclude his so testifying, now has not that effect, and it is the duty of jurors, where this is done, to give his testimony such weight as, in view of all the facts and circumstances shown, it shall appear to them to be entitled to. His interest is to be considered only so far as it affects his credit. His testimony is to be scanned and tested the same as that of other witnesses. If rational, natural, and consistent, it may outweigh the testimony of other witnesses. If inconsistent with established facts, or with his prior statements, you will treat it the same as you would that of any other witness whose testimony is thus defective.

"The law presumes every man innocent of the crime charged, and of every offense included in the formal charge; and this presumption surrounds and abides with him throughout the entire trial, and this presumption should be borne in mind at each successive step in your deliberations as to your verdict.

"To justify your conviction of the accused of any offense within the charge made in the information, it is the duty of the people, and on them

rests the burden thereof, to satisfy you by competent evidence that the respondent is guilty beyond a reasonable doubt."

The criticism made to the first paragraph is that the court should have used the language "any other witness or witnesses," instead of "other witnesses." The language used by the court is in no sense limited. It applied to any other witness, and to all other witnesses.

It is urged that in the second paragraph the court should have told the jury that they should start upon the trial with the presumption uppermost in their mind that the defendant was innocent of the crime charged, and that presumption should remain until the people had introduced proof into the case to overcome that presumption beyond all reasonable doubt. In addition to the language used in this paragraph and in the next succeeding paragraph, the court several times instructed the jury, not only generally, but specifically, that the prosecution must, by proofs, establish the guilt of the respondent beyond a reasonable doubt, and that the jury must give the respondent the benefit of all reasonable doubts, and of the presumption of innocence to which the law entitles him.

Again, it is contended that the court erred in instructing the jury that they should notice the difference between the two theories of the prosecution: First, that respondent purposely overturned the boat, or threw deceased into the river, and was not at the time committing or attempting to commit rape; and, second, that the boat was unintentionally overturned, while respondent was committing or attempting to commit rape. The point made is that the second count in the information alleges a willful act. But the court was not referring to counts, but to theories, and the last count does not charge that the boat was purposely overturned.

A number of assignments are based upon the failure of the court to instruct the jury more fully and particularly. As already intimated, no requests were presented relative to these matters. The omission of specific instructions for the defendant in a criminal case is not error, if the instructions were not asked for, and the charge actually given guarded the substantial rights of the accused, and was not misleading. *Driscoll v. People*, 47 Mich., 413, 11 N. W., 221. The instructions given by the learned circuit judge were clear, full, and specific, and the issues fairly presented. The conviction is affirmed.

GRANT, J., did not sit. The other justices concurred. (62 N. W. Rep., 1115.)

PEOPLE v. CLARK.

(Supreme Court of Michigan. April 30, 1895.)

Criminal law—Prosecution under Sec. 9367, How. Stat. information—Admissibility of statements made by accused—Charge to jury.

1. In a prosecution under Sec. 9367 How. Stat., when the information follows the statute, the fact that the conjunctive and not the disjunctive is used is not objectionable, reference being made to a single transaction.
2. It is not error to admit a statement made by defendant and reduced to writing by a stenographer, it appearing that such statement was made voluntarily and not as a part of the preliminary investigation before the police justice.

3. Confessions are inadmissible when induced by threats, or by a promise of favor made by persons apparently acting by authority.
In summing up the testimony in the charge to the jury it is the duty of the court to give the same prominence to the testimony of the defense as that of the prosecution.

Error to recorder's court, Detroit. Reversed.

Fred A. Maynard, Attorney General, and *Allan H. Frazer*, prosecuting attorney, for the people. *William Look*, *Joseph M. Weiss* and *Thos. J. Navin*, attorneys for defendant.

MCGRATH, C. J. Respondent was charged under section 9367, How. Stat., with willful neglect of duty, and corrupt conduct in the execution of his duty in canvassing election returns.

The information alleges that respondent "was guilty of willful neglect of duty and corrupt conduct in the execution of his duty," etc. The statute provides that if any officer "shall be guilty of any willful neglect of such duty, or of any corrupt conduct in the execution of the same, etc. The information follows the language of the statute, except that the conjunctive and not the disjunctive is used, the reference being to a single transaction. The objection is therefore without force.

It is next insisted that the testimony relative to the tabulated sheet should have been excluded as secondary evidence. The testimony traced the book containing the tabulated sheet to a room in a hotel at Lansing, and clearly tended to show that the sheet had been taken from the bound volume in that room by some person unknown, and had not since been seen by the party in whose custody it had up to that time been, and who was charged by law with its custody. There is no force in the objection.

The people offered in evidence a statement made by the defendant, and reduced to writing by a stenographer.

It was claimed by defendant's counsel that this statement was made in the course of the preliminary examination, and under the act creating the police court of the city of Detroit was inadmissible.

Charter, Sec. 661.

An extended colloquy then took place between the court and counsel, as to the circumstances under which the statement was made, during which counsel for defendant made the further objection that the statement was involuntary.

The statements made during the colloquy were unchallenged and tended to negative the allegations that the admissions were made as a part of the preliminary investigation before the police justice, or that they were involuntary, and defendant's counsel offered no testimony upon either subject. Under the rule laid down in *People vs. Barker*, 60 Mich., 277, no error was committed.

The respondent testified, with reference to this statement, that when he was arrested that he was taken to the office of the prosecuting attorney, who took him into a room; "told me that he had conclusive evidence that I knew all about it, and that if I had anything to say, to say it now; that if I wanted to make a confession I would have to make it before 12 o'clock that night or it wouldn't go;" that he was then taken to the central police station; that "the next man that I saw was Dr. Frank Houp, the druggist

on the corner of Sixth street and Michigan avenue, an intimate friend of mine. Afterwards Dr. Houp came to the cell with the officer and told me that I must make a confession to Mr. Frazer, and that I would have to make it before 12 o'clock; that Mr. Frazer told him I was to be without bail; that I couldn't get bail, and that I would rot on the damn planks if I didn't make a confession. He held up my family to me, told me if I knew anything to say it and save the children and my wife. * * * * After Mr. Houp left there that evening I waited until nearly 12 o'clock and I sent after Mr. Frazer according to directions of Mr. Houp, his instructions to me. Mr. Frazer came down there, I think, between 11:30 and 12 o'clock. Mr. Frazer called in an attendant there, a turnkey, or whatever you may call him. Told him to unlock the door and let me out. We went around into the back room. Mr. Frazer asked me what I had to say, and I said I didn't think I had anything to say what would be of any benefit to him on the case. He says I know all about this case, and I know you put the figures on there, and if you don't make a confession to me, you'll stay here until you rot. I asked Mr. Frazer if I could ask him a few questions before he said anything. He said I could. I think I also said that you're my attorney, laughing. I also said, now, Mr. Frazer, if I don't say anything to you that would be of benefit to you what time do I get out of here tomorrow morning? Mr. Frazer says, just as soon as I can make out the papers. I asked how long that would be. He said I don't know. It may take a little time. I said, do you think I will be out of here tomorrow, and he said, I think I can get the papers made out. I will start to make them out as soon as I get home. I said Mr. Frazer, another question is, what will be the result with me in case I should say anything that will be of benefit to you. He said, you ought to have confidence enough in me to know that I will take care of you.

Next morning Mr. Frazer sent an officer for me. I suppose he did; the officer came at last. The officer didn't say anything. I suppose it was bail. I was very anxious to get out. Instead of that it was to come to Mr. Frazer's office with an officer. I can't remember whether a stenographer was there. I think there were several reporters sitting around the table taking pictures or something of that kind, and Mr. Green was there. Mr. Frazer called me in his private office with Mr. Green, turned around and asked me if I wanted to talk to Mr. Green privately, and I think I nodded my head yes. Mr. Frazer went out and shut the door. I talked with Mr. Green a little while, perhaps five or ten minutes. Mr. Frazer came back, asked me what I found out, and I says I don't know anything. Q. What does Mr. Green know? A. He doesn't know anything. Mr. Frazer wanted to find out from me what Mr. Green knew. Then Mr. Frazer ordered the officer in again and locked me up, and I was taken down to the central station. I am not sure whether it was in the afternoon or the next afternoon that I was taken out. I can't say for certain. It strikes me it was Wednesday afternoon when I was again taken to Mr. Frazer's office. I can't remember who I saw there except the assistant prosecutor (Mr. Hunt) and Mr. Frazer. It was then that I made this statement. I heard the statement read by Mr. Mandell to the jury this morning. I was just about crazy during my imprisonment, and the times I was brought to Mr. Frazer's office and was laboring under great mental excitement."

The court was requested to instruct the jury that:

"No confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat or promise proceeding from a person in authority, and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly, and if such inducement, threat or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. The prosecutor, officers of justice having the prisoner in custody, or magistrate, are persons in authority.

"It is time for the jury to determine for themselves whether the alleged confession of the defendant was made freely and voluntarily without any influence of hope or fear; if so they may consider it; if not, it is no evidence.

"Any, the slightest menace or threat or any hope engendered or encouraged that the prisoner's case will be lightened or more favorably dealt with if he will confess, is enough to exclude the confession thereby superinduced and any word spoken in the hearing of the prisoner which may in their nature, engender such fear or hope, render it necessary that a confession made within a reasonable time afterwards shall be excluded unless it is shown by full and clear proof that the confession was voluntarily made after all trace of hope or fear had been fully withdrawn or explained away."

The court refused to give these requests, but instructed the jury as follows:

"You remember the statement made to the prosecuting attorney about which there has been so much discussion in this case, and you will remember the preliminary remarks by which the prosecuting attorney prefaced this statement. There is some question as to whether or not this statement was a voluntary statement. You remember the testimony of the prosecuting attorney himself, and also the testimony of Judge Whelan on that point, that the defendant was brought to the prosecuting attorney's office; that he told him he was not obliged to make this statement, and any statement he might make must be the absolute truth. He was not required to make it, and he was not promised any reward or leniency, threatened in any manner or coerced into making this statement — nor promised any immunity. Now, if you believe, gentlemen of the jury, that that was a voluntary statement made by him, then you must carefully consider his evidence in this case, because he stated in his testimony, as I remember it, gentlemen, that he had no recollection of having made this statement to the prosecuting attorney; and if he did make such statements as are set up in this statement, that it was untrue — that the statements are untrue, for at the time he says he did not know what he was doing — I believe his own language is that he was crazy at the time. It is for you to say, gentlemen, whether or not the statement was made voluntarily, or whether he was coerced into making it, and if you believe that he was forced to make it, then of course you should not consider it."

The requests presented should have been given.

The instruction given did not submit to the consideration of the jury the question of undue influence in obtaining the statement or of the inducements alleged to have been held out by the prosecuting attorney.

Confessions are inadmissible when induced by threats, or by a promise of favor, made by persons apparently acting by authority.

Flagg vs. People, 40 Mich., 706.
 People vs. Wolcott, 51 Mich., 612.
 People vs. Barker, 60 Mich., 277.

It is urged that the court, in charging the jury, brought out the salient points of the testimony for the people, referring to the witness by name, and did not give equal consideration to the testimony for the defense.

We think that the criticism is not wholly groundless.

The portion of the charge given is an illustration. The court refers to the testimony of the "prosecuting attorney" and to that of Judge Whelan; "that the prisoner was not required to make the statement, not promised any reward or leniency, threatened in any manner, or coerced into making the statement, not promised any immunity. When the testimony of the respondent is referred to, the testimony which tends to negative that of the people's witnesses as to the promise of reward or immunity is not alluded to, but the court refers to a statement made by the witness relating to certain of the contents of the paper as made with reference to the entire paper.

If the testimony is to be contrasted by the court, it must clearly appear that it has been done without prejudice.

The judgment is reversed and a new trial ordered.

People vs. Murray, 72 Mich., 10.

GRANT, J., did not sit. The other justices concurred.

PEOPLE v. SHEFFIELD.

(Supreme Court of Michigan. April 26, 1895.)

Criminal law—Prosecution under 3 How. Stat. 9314b—Conviction for lesser offense not legal.

In a prosecution under 3 How. Stat. 9314b, it is error for the court to instruct the jury that they could legally convict the respondent of a lesser offense than that charged in the information.

Error to Barry. Reversed.

Fred A. Maynard, Attorney General, for the people. William O. Lowden and Charles G. Holbrook, attorneys for defendant.

McGRATH, C. J. This is a prosecution under 3 How., 9314b, which provides that "If any male person or persons over the age of fourteen years shall assault a female child under the age of fourteen years, and shall take indecent and improper liberties with the person of such child, with-

out committing or intending to commit the crime of rape upon such child, he shall be deemed," etc.

The court instructed the jury that it would be legally competent for them to convict respondent of an assault and battery, it being a lesser offense, and included in the one with which respondent is charged, and the jury found the defendant guilty of assault and battery.

The charge of the court was erroneous and the verdict cannot stand.

The girl's testimony tended clearly to show that respondent was not guilty of any improper liberties. She testified that all respondent did or attempted to do was to put his arm around her waist, and that no offer or threat to take, or request to be allowed to take, any other liberties with her person was made by defendant.

Two young men testified that they saw the pair sitting on the ground; that the defendant's arm was around the girl, and that his other hand was under her clothes; that at all events, they did not see the other hand.

There was no middle ground here. The defendant was either guilty as charged, or the jury have been allowed to find that an act not unlawful in itself, constituted an assault. Such mere familiarity participated in and consented to by the child, in the absence of indecent and improper liberties, between a man over 50 years of age and a girl under 14, who have been intimate and frequently in each others company, does not constitute an assault. An assault involves "Every attempt or offer, with force or violence, to do a corporal hurt to another."

Drew v. Comstock, 57 Mich., 176.

Rape upon a female 14 years of age and upwards involves an assault with intent, an assault and battery, and an assault.

The assault must be shown to have been committed. It is included in the major offense, and is a necessary ingredient thereof. Each element going to make up the greater offense is in itself a statutory offense. In that class of cases it has frequently been held that the jury may convict of the lesser offense.

Carnal knowledge and abuse of a girl under 14 years of age is a statutory offense, although she consents.

People v. Courier, 79 Mich., 366; *People v. Miller*, 96 Mich., 119; *People v. Abbott*, 97 Mich., 484, were prosecutions under How., section 9094. In the first case it was insisted that the offense had not been completed, but the court held that penetration was not necessary; that force, against the will of the child, was not a necessary element of the crime; that sexual intercourse was sufficient, and if an assault is made with that design the assaulter is guilty of an assault with intent to commit the crime.

In the *Miller* case respondent was convicted of an assault with intent to commit the act, although the people's evidence was to the effect that the offense charged had been committed, and respondent denied even an attempt.

In the *Abbott* case actual sexual intercourse was shown and found. Each of these cases involved as a lesser crime the offense charged in the present case, and the testimony embraced that offense. In the *Courier* case, it is said: "If indecent liberties are taken with the child, with no intent to have sexual intercourse, it is punishable as an assault."

The statute in the present case aims at indecent and improper liberties with the person of the child. It is and of itself the lesser offense in the category of offenses committed with consent. When applied to a case where an assault is not associated, it involves no other statutory offense. Indeed it is the statute which gives to the act constituting the offense the character of an assault.

In *People v. Hicks*, 98 Mich., 86, the act was done against the protest of the child, hence involved an assault independent of this statute.

The judgment is reversed and the respondent discharged.

GRANT, J., did not sit The other justices concurred.

PEOPLE v. PALMER.

(Supreme Court of Michigan. June 4, 1895.)

Refreshing memory of witness—Homicide—Evidence—Instructions—Sentence.

1. It is proper, for the purpose of refreshing the memory of a witness, to call his attention to testimony given by him at a former trial of the same case.
2. On a trial for murder, where a witness testified that deceased had tried to hire him to kill defendant, and admitted on cross-examination that he married his wife from a house of prostitution, the asking in good faith of the question whether she was a prostitute was not prejudicial to defendant, when the answer was excluded.
3. Where, in the charge, every available defense was covered, it was not error to refuse to charge that, in determining which was the aggressor, the jury should consider the testimony that deceased was drunk, and, when so, was quarrelsome, while defendant up to the time of the tragedy was good tempered. McGrath, C. J., dissenting.
4. Where defendant had been previously acquitted of murder in the first degree, and the court, after defining murder in the several degrees, charged that on a trial for murder the jury should first consider the higher crime and then the different degrees, and subsequently withdrew from the jury all consideration of the higher degree, *held*, that the charge was not misleading.
5. On the trial of one charged with killing his brother in a saloon, the court instructed the jury that if, after defendant entered the saloon, he became aware that his brother was there, and then formed the intent to kill him, taking into account their previous quarrels, and that his brother was surrounded by friends, "if he then, even though but for a moment before he fired the fatal shot, formed in his mind the purpose of taking his brother's life, and pursuant to that purpose he shot and killed him, that would constitute the crime of murder." *Held* proper. McGrath, C. J., dissenting.
6. Where, on a trial for murder, it appeared that defendant, on entering the saloon where the tragedy took place, acted in his usual manner, and that, on raising the gun, his countenance changed, whether this was in malice or under the belief that it was necessary to shoot in self-defense was a question for the jury.
7. Where threats made against defendant by deceased on the day of the homicide were admissible, the response of the person to whom they were addressed that the latter had nothing to do with their quarrels, and that he had taken defendant to another city the day before to get him away from deceased, was admissible as part of the *res gestæ*. Montgomery, J., dissenting.
8. The failure to ask, in sentencing one convicted of murder in the second degree, if he had aught to say why sentence should not be pronounced against him, is not reversible error.

Error to circuit court Saginaw county; Robert B. McKnight, judge.

William Palmer was convicted of murder in the second degree, and brings error. Affirmed.

John E. Nolan (*George W. Wendlock*, of counsel), for appellant. *Fred A. Maynard*, Attorney General, and *E. A. Snow*, prosecuting attorney (*F. E. Emenck*, of counsel), for the people.

GRANT, J. For a statement of the issue in this case, we refer to 96 Mich., 580, 55 N. W., 994, where a brief statement of the case will be found. On the second trial the respondent was again convicted of murder in the second degree.

1. A witness by the name of Addett was also a witness for the people on the former trial. Upon the redirect examination of the witness, counsel for the people, for the sole purpose of refreshing the witness' recollection, called his attention to his testimony upon the former trial. This was permitted under objection and exception, and is now alleged as error.

This practice is too thoroughly established to now be doubted. *Beaubien v. Cicotte*, 12 Mich., 459; *McCreery v. Green*, 38 Mich., 186, and the authorities there cited; *Battishill v. Humphreys*, 64 Mich., 518; 38 N. W., 581. Respondent's counsel rely on *Bashford v. People*, 24 Mich., 246. That opinion, we think, recognizes the rule, but was based upon the fact that no occasion was shown for refreshing the witness' memory. In this case there was.

2. Error is next alleged upon the misconduct of the prosecuting attorney interrogating the defendant's witnesses upon the cross-examination. All the questions which were incompetent were promptly overruled by the circuit judge. One of the questions was as follows, asked of the defendant himself: "Then I understand you, if you are walking along with a gun, and you incidentally saw a revolver discharged in your direction, that you would take your gun, and cock it, and fire right into the crowd?" One Ruby, a witness for the defendant, testified that the deceased, Albert Palmer, had tried to hire the witness to kill William, the respondent. The story was such as to render a very rigid cross-examination of the witness' life and character competent. He admitted that he married his wife from a house of prostitution, and the question was then asked, "Was she a prostitute?" One other question of a similar character was asked, and both excluded. There was nothing to show that the questions were not asked in good faith, and we do not think they were of such a character as to justify the holding that they prejudiced the jury.

3. It is alleged as error that the court refused to give the following specific request on behalf of the respondent: "In determining which of the brothers was the aggressor, you may also take into consideration the testimony tending to show that, on the date of the tragedy, Albert was under the influence of liquor, and that when under the influence of liquor, he was ugly and nervous and of quick temper, and that the defendant, up to the instant of the shooting, was in his usual frame of mind, pleasant and good natured." The charges so full and complete, covering every possible ground of defense, that we do not think it was error to refuse this request. Besides, this request was rather in the nature of an argument based upon a portion of the testimony in the case. Undoubtedly, this question was fully argued by counsel to the jury. Such argu-

mentative requests are of doubtful propriety. *People v. Crawford*, 48 Mich., 498, 12 N. W., 673. But, aside from this, the court specifically called the jury's attention to the acts, conduct, and threats of the deceased, the facts and circumstances surrounding the killing and their relations prior thereto, and instructed the jury that they were all for their consideration.

4. In the opening part of his charge, the judge defined the different degrees of murder and also manslaughter. He said that, where a crime was divided into degrees, the jury may acquit of the principal charge, and find the prisoner guilty of the lesser offense; and that, when one is so charged, the jury should first consider the matter of the higher crime, and then go through the different degrees. After some further explanations, he withdrew from their consideration the subject of murder in the first degree, since he had been acquitted of that charge in a former trial. It is insisted that the charge is misleading and prejudicial because he first defined murder in the first degree, and instructed them that they should commence with the higher crime. A juror who could be thus misled or prejudiced would not possess intelligence sufficient to justify his sitting as a juror in any case.

5. It is next argued that the court erred in giving the following request: "Now, if, after he entered the saloon, he became aware that his brother Albert was there, and that he then formed the intent to take his brother Albert's life, taking into account whatever may have been in his mind as to their past relations, their quarrels, or anything that he may have heard about Albert having a pistol, and if he became aware that Albert was in the back part of the saloon, surrounded by his friends, if he then, even though but a moment before he fired the fatal shot, formed in his mind the purpose of taking his brother's life, and pursuant to that purpose he shot and killed him, that would constitute the crime of murder." The precise point urged is that there was no evidence to support such a theory, and that neither the prosecution nor the defense conducted the trial with reference to it. We cannot tell what the argument was to the jury. If there is any testimony upon which to base the charge of the court, the charge must be sustained. The respondent claimed that he had no murderous intent at any time. There was evidence that when he entered the saloon he appeared in his usual manner and there was evidence that when he raised the gun his countenance changed. Whether this was because he saw his brother or saw the pistol pointed at him and whether it was necessary for him then to shoot in self-defense are all questions for the jury and made competent the charge complained of which was given in connection with instructions covering the respondent's theories. The entire instructions covering this point are found in the margin.¹

¹ Now, if, after carefully considering all the evidence in the case introduced upon both sides, and after carefully considering all the facts and circumstances surrounding the tragedy, and the relations of the accused and the deceased prior to the tragedy, and taking into account previously uttered threats, if any there were by either, and taking into consideration any quarrels that may have been between the brothers, if any, and also taking into account whether the parties became reconciled and were friends before this fatal day, and whether they were friends, then, I say, taking into consideration all of those facts and circumstances it would be an object for the jury to inquire into as to the intent with which this act was done,—whether it was an act committed in malice, whether it was an act committed in passion, or whether it was an act committed under the impulse of fear; and if, after a careful examination of all those facts that I have called your attention to, if each juror, looking into his conscience, could say that he has an abiding conviction, to a moral certainty, of the defendant's guilt, it would be his duty to convict, because that would be proving the case by evidence beyond a reasonable doubt, as defined by the law.

As has been said, the killing may have constituted manslaughter or it may be entirely excusable according to the circumstances, and according to the state of mind with which the act was committed;

6. After the first difficulty in the saloon between the two brothers, and about an hour before the tragedy Albert went out of the saloon, and had a conversation with one Bruce, and one Poquette. The conversation related to the trouble in the saloon. The respondent stood on the sidewalk, 150 to 200 feet from him. Bruce testified that Albert said: "I won't be beat and bruised up by that bully. He is too big for me. I am not able to fight him, and, furthermore, I don't have to. I got something to aid me;" showing a box of cartridges. Albert then said to Poquette, in Bruce's presence: "What did you people up in that saloon mean by letting that man abuse me? He is too big for me. I don't want to fight him, and don't intend to. I have got something to protect myself with;" taking a revolver out of his pocket. Poquette replied: "I haven't anything to do with your troubles, Al. Didn't I take him to Bay City yesterday to take him away from you?" Complaint is made only of the admission of the statement of Poquette, who was not produced as a witness, although upon the trial the objection was to the entire conversation. Certainly, the statements of the deceased were competent, and were favorable to the respondent, in that they showed a hostile feeling on the part of the deceased and an express threat. It was not only right but the duty of the prosecution to place this conversation before the jury in so far as it showed the state of mind and disposition towards the respondent. The objection to its admission was raised when the testimony was offered. The judge, in admitting it, stated that he received it as a part of the *res gestæ*, and confined it to such conversation as involved the relations of the brothers on the day of the homicide. This ruling is sustained by the following authorities: *People v. Potter*, 5 Mich., 5; *Brown v. People*, 17 Mich., 433; *Patten v. People*, 18 Mich., 327; 1 Greenl. Ev. 108. Greenleaf says: "Upon an inquiry as to the state of mind, sentiments,

and the principal inquiry in this case must be limited finally to the question of the intent with which this act was done. At the danger of repeating, I say that the principal inquiry in this case must be limited finally to the question as to the intent with which William Palmer fired that gun on the day of the shooting. If, at any time before the shot from the revolver was fired, William Palmer had formed the intent and purpose in his own mind, with malice aforethought, to take the life of Albert Palmer, then the mere fact, that while he was engaged in issuing this challenge, his brother, knowing of the danger, was able to first pull a revolver, and to discharge it, would not affect the guilt of the defendant. That implies the forming in his mind, before the firing of the fatal shot, of the intent to take his brother's life; and that would be so because the firing in that case upon his part is immediately connected with the previous malicious and wilful intent to take his life; and if Albert, seeing his danger, or knowing that William Palmer was coming in his direction, armed with the fatal weapon, and with the challenge upon his lips, was able to draw his pistol and fire, that act would not affect the guilt of William Palmer. If the jury should find beyond a reasonable doubt that, before he fired the fatal shot, Wm. Palmer had formed a settled, premeditated, preconceived, or deliberately formed purpose to take his brother's life, and that in pursuance of that purpose he procured the gun and the cartridge, and loaded the gun, and carried it to the place where the shooting occurred, with the previously formed purpose, with malice aforethought, to there make use of that gun for the purpose of taking his brother's life, that would constitute the crime of murder, and you would be justified and it would be your duty to find the respondent guilty of murder in the second degree. Or if you should find the fact to be beyond a reasonable doubt that in the first intention Wm. Palmer procured his gun for an entirely innocent purpose, and that he loaded it with an innocent purpose, and intended to go hunting an eagle, as testified to by him, but that any time after procuring the gun, or at any time after entering the saloon, he formed a settled, deliberate purpose and intention, with malice aforethought, to take his brother's life, by shooting him with that gun, that would constitute the crime of murder; for if, at the time the shooting occurred, there was present in the mind of William Palmer this malicious purpose and intent to take Albert Palmer's life, then, no matter how quickly it was formed or how immediately before the shooting it was formed, if it existed in the mind of William Palmer when he fired that shot, and if it was the actuating, moving cause that impelled him to fire that shot, and if you believe from the evidence, beyond a reasonable doubt, giving the respondent at all times the benefit of this presumption of innocence which I have defined, but notwithstanding that you found him so guilty, it would be your duty to find him guilty of murder in the second degree. In other words, the state of facts I have defined would constitute the crime of murder, and you would be justified in bringing a verdict of murder in the second degree.

In the next place, if, after a consideration of all of this evidence, you do not find from the testimony in this case beyond a reasonable doubt the existence of all the ingredients constituting the crime of murder in the second degree, as I have defined it to you, you should then direct your attention to the investigation of the evidence in the case to see if a crime of lesser degree had been committed by this respondent, and you should endeavor to ascertain and determine if the crime of manslaughter was committed, for the crime of manslaughter, as before stated and defined to you, is an unlawful and felonious killing of another without malice expressed and implied. When one man suddenly kills another in the heat of passion, but without malice, and without a previously settled and deliberately formed purpose to

or disposition of a person at any particular period, his declarations and conversations are admissible." The admission of the statement of Poquette to the deceased is more doubtful. The general rule is, however, that the entire conversation is admissible. It all related to the trouble existing between the two brothers. They had just had a quarrel in a saloon at which Poquette was present. It is not the rule to include that portion of a conversation which is favorable to a party, and exclude that which may be against him. The entire conversation is admissible, and a jury may well be trusted with its consideration. We think no error was committed in admitting it.

7. Ten days after the conviction, the respondent was brought into court, and sentenced. The record does not show that the respondent was asked what he had to say why judgment should not be pronounced upon him, and for this reason it is urged that the judgment must be reversed, and a new trial ordered. The respondent's counsel was present, and made no objection to the proceeding. There had been ample time to move for a new trial or an arrest of judgment. This was never regarded as essential except in capital cases. 4 Bl. Comm., 375; *Jeffries v. Com.*, 12 Allen, 145; *West v. State*, 22 N. J. Law, 212; *McCue v. Com.*, 78 Pa. St., 185. Whatever good purpose this practice may have served in England when parties charged with crime were not allowed counsel, it is now a mere idle ceremony. But, even if the sentence were erroneous for this reason, it was not an error upon the trial, but simply an error in imposing sentence, for which the prisoner would be remanded to be sentenced afresh. *McCue v. Com.*, *supra*; *State v. Hoyt*, 47 Conn., 542.

The judgment is affirmed.

LONG and HOOKER, JJ., concurred. (63 N. W. Rep., 657.)

do so, if no such purpose or wicked intent existed at the time in his mind, and in the heat of blood, and inflamed with passion, he suddenly strikes the fatal blow or fires the fatal shot which causes the death of another,—if the jury should find the existence of such a state of facts beyond a reasonable doubt,—they would be justified in finding the accused guilty of the crime of manslaughter. Manslaughter is perfectly distinguishable from murder, in this: That though the act that causes death be unlawful or wilful, though attended with fatal results, yet malice, either expressed or implied, which is the very essence of murder, is to be presumed to be wanting in manslaughter.

If the jury should reject this evidence, but should find beyond a reasonable doubt, in accordance with the theory of the respondent and his witness, that he procured this gun with the innocent purpose of hunting near Green Point, or hunting for an eagle that he had ascertained was there, that he did not know at the time where his brother was, and that there existed at the time in his mind no intent to do his brother harm, but that, pursuant to his purpose to hunt for this eagle, he went to the saloon of Jerry Noel after the rubber boots and the cartridges and some liquor, and that he was intending, as soon as he had performed his errand there, to proceed upon his hunt, let us see what situation that would present. That assumed that at the time he entered the saloon, there was no criminal intention in his mind. Now, if, after he entered the saloon, he became aware that his brother Albert was there, and that he then formed the intent to take his brother Albert's life, taking into account whatever may have been in his mind as to their past relations, their quarrels, or anything that he may have heard about Albert having a pistol, and if he became aware that Albert was in the back part of the saloon, surrounded by his friends, if he then, even though but a moment before he fired the fatal shot, formed in his mind the purpose of taking his brother's life, and pursuant to that purpose he shot and killed him, that would constitute the crime of murder. If, however, he did not form any such purpose, but if, seeing the other parties in the saloon, he raised the gun in his hand in the spirit of banter only, and said, "Where is the man that wants to shoot me? Come up, come up," and approached the party, and if, while he was doing that in friendliness and in play, he saw his brother, and saw the revolver in his hand, and if that aroused his blood or any rancor that might have existed in his heart or angered him, and in that anger and passion, if he raised his gun and shot his brother—if you should find the existence of those facts beyond a reasonable doubt—that would constitute the crime of manslaughter. But if, putting both of those aside, there was no intention in the heart of William Palmer when he entered there to kill his brother, if he was going upon this hunt, and had no thought of malice or ill will towards his brother, and no intent to do him harm, but entered the saloon for the purpose that he said he did, and passed to the opening in the screen door, and when he was in front of the door, and but a short distance from the door, if he suddenly saw a hand extended with a revolver pointing towards him, and if at the time he was impelled by fear, and apprehended at the time, as appeared to him, that he was in danger of losing his own life, or in danger of great bodily harm, and if he raised his gun under those circumstances, and discharged it, and his brother's death was caused thereby, that would be excusable homicide, and the matter is to be viewed from the standpoint of William Palmer at that time when he saw that deadly weapon confronting him.

The jury are to pass on the weight of all the evidence tending to establish any one of these different theories. But, before you can convict the respondent, you must find him guilty beyond a reasonable doubt.

PEOPLE v. CONSIDINE.

(Supreme Court of Michigan. April 30, 1895.)

Impeachment of witness—Continuance—Summoning jurors—Trial—Custody of jury—Receiving stolen goods—Evidence—Instructions.

1. After having called the attention of a witness for the people to his evidence on a former trial, and having asked him if he made certain statements, the defense sought to impeach him by having read the stenographer's minutes of the former trial, but the stenographer was not asked the same question as the witness sought to be impeached. *Held*, the evidence was properly excluded. McGRATH, C. J., and MONTGOMERY, J., dissent.
2. It is within the discretion of the court to refuse leave for a continuance to obtain counsel.
3. The judge of the district court may, under laws 1893, No. 204, on his own motion, order additional jurors, when enough are not drawn, and the fact that his attention was called to it by the county attorney is immaterial.
4. A person who is an elector, though not a full citizen, is competent to act as a juror, under laws 1893, No. 204, § 5.
5. It is within the discretion of the trial court to direct the jury to remain in the custody of the officer during the trial.
6. The court can permit a witness for the prosecution to remain in court during the trial.
7. Where an accomplice has already testified on cross examination as to his knowledge of the responsibility for his acts, the exclusion of the question, "Do you know that you are liable for what you did that night—criminally liable?" is immaterial.
8. Where the testimony of the people tended to show that defendant was given a check for the goods, and when arrested threw a piece of paper into his mouth, and chewed it beyond recognition, it was proper to permit the prosecution to introduce a blank check which the giver testified was similar to the one given to defendant, to show that it corresponded in color to one found in the form of a wad near the place of arrest.
9. It is within the discretion of the court to permit the prosecutor, on cross-examination of a *particeps criminis* of the defendant, to ask a leading question.
10. Whether or not the county attorney prepared the bail bond of a witness who has testified that he is under arrest, and is out on bail, is immaterial.
11. Where the defendant was charged with having received and concealed stolen goods, a question asked a detective, if he sought to induce a certain person to buy the goods after they had been so received and concealed, is properly excluded, as the offense, if any, had been already committed.
12. It is not the right of defendant to insist that the prosecutor call accomplices of defendant charged with the same offense, when their testimony would be merely cumulative.
13. It is not error to refuse an instruction containing a correct proposition of law, which has no application to the case.

Error to recorder's court of Detroit; William W. Chapin, judge.

Appeal by William Considine from a conviction of knowingly receiving and aiding in the concealment of stolen goods. Affirmed.

Edwin Henderson and Alfred J. Murphy (James H. Pound, of counsel), for plaintiff in error. Fred A. Maynard, Attorney General, and Allan H. Frazer, prosecuting attorney, and Ormond F. Hunt, for the people.

MONTGOMERY, J. Respondent was convicted of receiving and aiding in the concealment of 80 bolts of cloth, knowing the same to have been stolen from one Julius W. Esser. The evidence tended to show that

respondent went with one Wirth and one Hahn to the boathouse of one Duff Fecteau, at Grosse Pointe, on the 8th or 9th of December, 1893, and that the stolen goods were there obtained, taken into a one-horse wagon, and removed to Wirth's place, on Atwater street; that subsequently the goods were taken to the tailor shop of one Hoetger, and there sold, and that a check was given to respondent by Hoetger in payment for the goods; that respondent was arrested directly in front of Hoetger's store, and that he immediately threw a piece of paper into his mouth, which he refused to give up until it was so chewed that it could not be identified. Respondent admitted that he was present on the occasion, but his testimony differs from other witnesses in some details as to what was said and done, and he claims to have been acting without any knowledge that the goods were stolen, and without any connection with the transactions relating to their concealment or sale.

Complaint is made that the trial judge refused to grant a continuance of the case to enable respondent to obtain counsel. We have examined the record with care, and are satisfied that there was no such abuse of discretion on the part of the trial judge as would justify us in reversing the case upon this ground. Respondent was represented on the trial by two counsel, and while his counsel insisted that the attorney originally employed in the case, Col. Atkinson, would have been better prepared to try it, the record affords indication that it became a question as to whether Col. Atkinson would postpone the present case or another case in which he was at the time engaged. Some discretion must be allowed a trial judge in arranging and disposing of cases, if courts are to be run with any regard whatever for economy, and we are not prepared to say that there was any abuse of such discretion in the present case.

On the day preceding the trial, the circuit judge made an order for the summoning of 30 extra jurors, under the provisions of act 204 of the laws of 1893. The jurors were publicly drawn. After the drawing, an order was made that the names of the jurors so drawn should not be given to the public or to the counsel for the prosecution or defense. On the morning of the trial, Judge Gartner, who had assisted in a former trial of the case, appeared, and noted an exception to the entry of the two orders for drawing the extra jurors, and the order suppressing the names of the jurors. Following upon this the following proceedings took place: "I now ask, if your honor please, to see the original *venire* in order to ascertain as to the regular drawing of this jury. By the court: You may say it." The *venire* was produced, and handed by the clerk to Judge Gartner. "Mr. Frazer: Counsel has asked for the minutes of this drawing, to see whether the matter was regular. He brings it here, and immediately dictates to Tom Navin's brother the names of the jurymen. I ask that he be ordered to surrender it to the clerk. The court: I understand your purpose in receiving— Judge Gartner: I desire to ascertain as to whether the names have been returned by the jury commission or not, and I have a right to do that. The Court: There is no question about that. You may read that over. Mr. Hunt: Do I understand that he is to have time, not only to read over these names, but to go down to the jury commission, and come back here, and make an investigation at this time? The court: No, sir; we are to proceed to impanel a jury this morning. You may proceed now." Counsel for defendant insisted that they had a right to ascertain "whether these names are the names in the jury box or not;" and asked that the clerk furnish a list of the names, to

which the court replied that counsel would have to be satisfied with the return, counsel stating: "It is customary, as I understand, at the beginning of the trial, for a list of the jurors, their names and residences, to be furnished to attorneys. Now, this list that was drawn yesterday, of course we don't know anything about it. The list was not furnished. The court: It was your business to be present, and ascertain who was drawn. Judge Gartner: We don't know anything about it. The court: You should have known it. Judge Gartner: I don't know what time it was, as far as that is concerned, if your honor please. It strikes me that I ought to have had some kind of notice, and I desire further at this time to enter an exception to the drawing of this jury at this time, without having given counsel for the respondent notice of the drawing of the jury."

These proceedings were followed by an application for a continuance, which was denied, and the impaneling of the jury proceeded, the clerk proceeding to call first from the regular panel of jurymen, and, after that panel was exhausted, called jurymen from among the names drawn from the box on the previous day. The statute contemplates that the drawing of jurors shall be public, and that after the names are drawn the minutes of the drawing shall be signed by the commissioners and attending officers, and filed in the clerk's office, when it is made the duty of the clerk to make out a *venire facias* directed to the sheriff, directing him to summon persons named to appear and act as jurors. The practice pursued in this case of suppressing the names of jurors cannot be commended. It seems to have been adopted in the fear that, if the knowledge of the names of the jurors was furnished, there would be opportunity for tampering with the jury. But, in our view, the trial judge was too apprehensive. We need not determine whether respondent's counsel have pursued the correct practice, or whether the error is such as to call for a reversal of the case, as we are of the opinion that the judgment must be reversed on other grounds, but the question is of too much importance to pass unnoticed. A person accused of crime is entitled to a fair opportunity to ascertain the antecedents and predilections of those to whom his fate is to be committed, and this right may be as important to him as the right to be confronted with the witnesses against him. The claim is made that there was no written application for the order directing the drawing of additional jurors, but we think this was necessary. It is made the duty of the judge, by the statute in question, to order additional jurors when enough are not present, and this he can do on his own motion. The fact that his attention has been called to it by the prosecuting attorney, either verbally or otherwise, would certainly not nullify his action.

Exception was taken to permitting one Charles Kulling to act as juror, for the reason that he was not a citizen. This question is ruled by *People v. Scott*, 56 Mich., 154, 224 N. W., 274; *People v. Rosevear*, 56 Mich., 158, 22 N. W., 276. See, also, No. 204, laws 1893, § 5, which provides that jurors shall "have the qualifications of electors in the town or ward in which they reside and for which they are returned by said board." The juror in question was an elector, though not a full citizen.

Exception was taken to the court directing the jury to remain in the custody of the officer during the trial, and to the ruling of the court permitting one of the witnesses of the prosecution to remain in court during the trial. Both rulings were clearly within the discretion of the court. As to the latter, see *People v. Machen* (Mich.), 59 N. W., 664.

On the trial a witness who took part in the removal of the goods to Water street was called, and upon cross-examination he was asked: "Do you know that you are liable for what you did that night—criminally liable?" This was objected to as immaterial, and the objection was sustained. While this question might properly have been allowed to be answered, we think it cannot be said that the respondent was prejudiced, in view of all the testimony of the witness. He had already testified, on cross-examination, that, at the time of the conversation with the detectives, he did not know whether he would be arrested or not; that no promise had been made him then or since; that he did not expect any leniency from the prosecuting attorney for his testimony in the case; and further stated, after the objection above quoted: "No one has told me that I am liable to arrest for what I did. Blade drove the wagon all the time." This testimony so fully covered the question of the witness' knowledge of the responsibility for his acts that the exclusion of the particular question quoted is immaterial. As before stated, the testimony of the people tended to show that respondent, on the occasion of the arrest, threw a piece of paper into his mouth, and chewed it beyond recognition. The prosecution were permitted to introduce a blank check, taken from Hoetger's check book, and which he had testified corresponded to the one which he had given to Considine. This was objected to. We think the testimony was admissible to show that the paper corresponded in color with that which was afterwards found in the form of a wad of paper on the sidewalk near where Considine stood. On the cross-examination of Hoetger, the witness testified that Fecteau spoke to him about buying the goods, and he was asked: "Did he know the detectives had been there to see you, from what he said?" This was excluded by the court, with the remark: "This man cannot swear as to whether or not Mr. Fecteau knew such and such to be the case." Whether this ruling was strictly correct or not is immaterial, as it appears that Hoetger subsequently had an interview in the presence of Fecteau with the detectives, before the goods were brought to the store, which was the only purpose with reference to which the testimony sought was competent.

The sixteenth assignment of error relates to the ruling of the court permitting the prosecutor to ask a leading question of a *particeps criminis* of the defendant. The question put was: "Didn't you say, at the last trial, that he stood at the head of the horse?" The witness started to answer this question, "I said he stood about ten feet," when interrupted by the objection. The question was not further answered, but was followed by the question: "After Hahn told him to go down and watch the horse and be on the lookout, where did Considine go? Answer. He stood—I told you before—about five or ten feet in front of the horse." We think it was within the discretion of the court to allow the question to be put in this form. On the cross-examination of this witness he was asked: "Did Considine at any time know what was in those trunks, to your knowledge?" This was objected to, and the court stated: "You can ask this witness if he knows whether or not Mr. Considine knew." Counsel should have adopted the question suggested by the court. He had testified to all the facts and circumstances, and the negative statement that he did not know that Considine had any knowledge of the contents of the trunk would not have strengthened the defendant's position, unless he had some knowledge upon the subject other than that derived from his connection with

the transaction. Whether he had this knowledge, it was very proper that the court should require the defendant to ascertain by a preliminary question in the form suggested. Indeed, a negative answer to this question would have removed any possibility of the jury drawing the inference that the witness did know that Considine had guilty knowledge, and had withheld the fact from them. While this witness was on the stand he testified that he was under arrest in the cause, and was out on bail. He was asked on cross-examination if the prosecuting attorney did not prepare his bail bond at the time he was arrested. This was excluded as immaterial, and we think rightly. The fact sought to be elicited could not have affected the witness' standing. Testimony offered by the people that, about 10 minutes after the arrest, a wad, which looked like paper chewed up, was picked up near the place of Hoetger, still wet, was competent. There was enough from which the jury might have inferred the connection between this and the check which was given to Considine, when taken in connection with the statement of the witness that Considine was seen to place a paper in his mouth.

The sixty-seventh assignment of error is based upon the refusal of the court to permit the defendant's counsel, upon cross-examination of one of the people's witnesses, to call out a purely hearsay statement, and has no merit.

Error is assigned upon the refusal of the question put to one of the officers, who was asked: "You went up there to get Hoetger to buy these goods?" It was excluded. The subsequent testimony of the same witness sufficiently shows that the officers did act in conjunction with Hoetger, and counsel relies upon *Saunders v. People*, 38 Mich., 218, as authority to show that this was important. But this respondent is not charged with having sold these goods, but with having received them and concealed them. If the purchasers were on trial the fact that the officers had connived to induce them to make the purchase might bear upon the question of whether the offense was committed, but the offense, if any was committed, was committed before these means of detection were resorted to. One of the officers was asked the question, "Don't you know who stole those goods?" This was excluded, as the evidence was that the officer did not know of his own knowledge, and the question called for hearsay. It was incompetent.

Error is assigned upon the refusal of the court to compel the prosecutor to call and examine two witnesses, Jesse Trumbull and August Hahn, who are shown by the testimony to be accomplices of respondent, and against whom informations had been filed on the same charge. The testimony of the witnesses would also have been cumulative, and it is not the right of the respondent to insist upon their being called.

Error is assigned upon refusal of the court to give certain instructions. The eleventh asks, in substance, an instruction that, if the officers of the law were cognizant of the fact that a crime was about to be committed, it was their duty to prevent the commission of a crime, and if they "connived at, assisted, and had knowledge that the crime was to be committed, in the manner and form charged in the information, and the officers were present at the place for the purpose of making complaint against defendant and others, and using the evidence thus acquired for the purpose of the prosecution of defendant and others, that evidence is open to unfavorable inferences, and the jury should examine such testi-

mony with closest scrutiny." The instruction contained a correct statement of the law, but it has no application to the case in hand. As before stated, it was not the attempted sale of the goods to Hoetger which constituted the offense with which defendant was charged, but the previous acts of concealment; and the fact that the officers were present, attempting to detect this crime through the intervention of Hoetger, did not justify any unfavorable inferences by the jury. They were simply discharging their duty.

The thirteenth and fourteenth, we think, are sufficiently covered by the general instructions.

The fifteenth and sixteenth are not insisted upon.

The nineteenth request is not covered by the general charge. This request reads as follows: "Under the testimony of Kennedy, of Schroeder, of Blay, and of Wirth, each is guilty of the charge contained in the information. Each testified that he had guilty knowledge. They are, under the law, *particeps criminis*, and their testimony implicating defendant must be by the jury regarded with extreme suspicion." This instruction was not given, nor was the subject adverted to, except as appears by the two following extracts from the charge: "The question for you to decide is whether or not the defendant is guilty as charged in the information, and it is immaterial whether other parties have or have not been arrested, and you are not to take that fact into consideration in arriving at your verdict." And further: "You have heard all the testimony in the case, and have seen all the witnesses. You may give the testimony of the different witnesses such weight and credence as you think it is entitled to, and if, after a careful consideration of all the evidence, you are satisfied beyond a reasonable doubt," etc. We are not prepared to say that the instructions requested should have been given in the precise form in which they were preferred. The rule is well settled that the credibility of an accomplice, like that of any other witness, is exclusively a question for the jury, and that the jury may convict upon the testimony of an accomplice alone. But it has also been frequently stated that it is in many cases important that the court should comment upon the nature of such testimony, and point out the grounds of suspicion which may attach to it, calling the attention of the jury to the situation and the temptation under which such witnesses may be placed, and especially if there is testimony tending to show that they have been induced to take the stand in a particular case under a promise of immunity. See *People v. Hare*, 57 Mich., 505, 24 N. W., 843; *People v. Jenness*, 5 Mich., 305; *People v. Schweitzer*, 23 Mich., 301. It would certainly in this case have been proper for the court to have directed the attention of the jury to the subject-matter covered in the request, but whether a failure to do so would be sufficient ground for reversing the case we need not determine.

On the cross-examination of one August Wirth, a witness for the people, he gave testimony as follows: "Was sworn on the former trial of this case. I did not swear on the former trial of this case that at the time those goods were thrown down out there in Grosse Pointe that Considine was not there. I did not swear in that case that when I came out, after I went in to get the goods, that Considine was gone. On the former trial I swore that Hahn said to Considine, at the boat house, 'Go and watch the horse, and be on the lookout.'" The stenographer of the court was called by respondent's counsel, and, after stating that he had the shorthand minutes of the testimony taken on the last trial, was asked to read the

testimony of the witness Wirth with reference to what was said and done at the boat house at Grosse Pointe at the time he swore he (the defendant, Considine) and Gus Hahn were there. An objection was made to this, on the ground that no foundation had been laid for impeachment of the witness Wirth. Respondent's counsel stated that he wished to impeach the testimony of the witness Wirth given on this trial by the testimony of the same witness given on the former trial. The objection was, however, sustained. The respondent's counsel then asked leave to recall the witness to lay a foundation, which request was refused. We think the first question put should have been allowed. The attention of the witness appears to have been called to his former testimony, and the proper foundation laid. The objection was general that no foundation had been laid for the impeachment of the witness Wirth. No criticism was made as to the form of the question, and this objection, we think should not have prevailed. Numerous other errors are assigned, but we think none of the questions presented are likely to arise upon a new trial of the case. The judgment should be reversed, and a new trial ordered.

MCGRATH, C. J., concurred with MONTGOMERY, J.

LONG, J. I am unable to agree with my brother MONTGOMERY upon the reversal of this case.

1. While it is true that a person accused of crime is entitled to a fair opportunity to ascertain the antecedents of those to whom his fate is to be committed, we think the practice pursued here was not so prejudicial to the respondent as to entitle him to a new trial. The statute contemplates that, when there are not enough jurors present to form a panel, the court may at once direct talesmen to be drawn and summoned. Had the order in this case been made, even on the morning of the day of the trial, it would have been equally valid, and no greater opportunity would have been furnished either counsel to investigate as to the qualifications of the jurors. It does not appear that ample opportunity was not afforded the parties by examination on the *voir dire* to do so. Nor was there any challenge to the array.

2. The request to charge should not have been given in the form in which they were preferred. While it would have been proper for the court to have directed the attention of the jury to the subject matter covered in the requests, yet the failure to do so, when the requests were not proper in form to be given, cannot be held as reversible error. It is well settled that the credibility of an accomplice, like that of another witness, is exclusively a question for the jury, and that the jury may convict upon the testimony of accomplices alone. While it has many times been held that it is in many cases important that the court should comment upon the nature of such testimony, and point out the grounds of suspicion which may attach to it, yet where the court is not asked specifically to call the attention of the jury to such grounds of suspicion, I know of no case holding that a failure to do so has been held error. In the present case certain requests were asked, but, inasmuch as such requests were not preferred in proper form, I do not think the refusal to give them was error, or the failure of the court to call attention to the testimony of accomplices such error as calls for reversal.

3. The reason for the reversal of the case is placed by my brother MONTGOMERY upon the questions arising under the cross-examination and attempted impeachment of the witness Wirth, who was called by the people. The record shows that upon cross-examination Wirth testified as

follows: "I was sworn on the former trial of this case. I did not swear on the former trial that, at the time the goods were thrown down out there in Grosse Pointe, Considine was not there. I did not swear in that case that, when I came out after I went in to get the goods, Considine was gone." I think the foundation for the impeaching testimony was sufficient, and that the court was not in error in not permitting the witness to be recalled to lay further foundation for its introduction. The trouble with the defendant's position is that his impeaching question was not in proper form. The testimony given on the former trial might or might not tend to impeach the witness. If it would not, then it was incompetent. In impeaching a witness in this manner, the same language, in substance, must be repeated to the impeaching witness as was asked of the witness whom it is sought to impeach. This is the only fair and competent method of impeachment, by showing contradictory statements. *Rice v. Rice* (decided at last term of this court), 62 N. W., 833; *De Armond v. Neasmith*, 32 Mich., 231. The reasons for the rule are there stated. In *De Armond v. Neasmith*, *supra*, it is said: "When an attempt is made to impeach a witness, there should be no reasonable doubt but that the questions asked impeaching witness and the witness sought to be impeached are one and the same." The same rule was laid down in *Rice v. Rice*, and it was said: "The language which it is claimed the witness used must be given, and he be asked if he used it." In the present case the only offer made was to read from the testimony given by Wirth on the former hearing. The judge may have given a wrong reason for a correct ruling, or the prosecuting attorney may have given a wrong reason for objecting; but if the question was not proper, under the well settled rule, which counsel are presumed to know, I see no reason why, under the circumstances of this case, courts of appeal should hold that there was error for which a new trial should be awarded. I think this point should be held bad for another reason. The testimony offered was in writing, taken down by the official stenographer. It was therefore in the power of the counsel for respondent to have incorporated it in his bill of exceptions, and thus show to this court whether in fact the statements were conflicting. If they were not, then no error was committed in excluding it. Had the attempted impeachment consisted of a letter written by the witness, which the court rejected, clearly the letter should have been incorporated in the record, in order that the court might determine whether it was material. I see no reason why the same rule should not apply to the written testimony of a witness. I think it a wholesome rule that, whenever written evidence is excluded, it should be put in the record, so that the court may determine its competency, and not reverse a case where no injustice may have been done. The judgment must be affirmed.

GRANT, J., concurred with LONG, J.

HOOVER, J. I agree with my brother LONG that this cause should not be reversed for the refusal of the court to permit the reading of the stenographer's minutes taken upon the former trial. Under repeated decisions, such minutes were not a part of the record. *Edwards v. Heuber*, 46 Mich., 95, 8 N. W., 717; *People v. Sligh*, 48 Mich., 54, 11 N. W., 782. Neither were they depositions or private writings of the witness sought to be impeached, nor writings signed by him, which may be read without the usual foundation being laid. See *Lightfoot v. People*, 16 Mich., 507. They stand, then, on no better footing than any other writing made by the impeaching witness. Such writings may always be used by the wit-

ness to refresh his recollection, but for no other purpose. The court has so far enlarged this rule (if it be an enlargement) as to permit a lawyer who took minutes at the trial, which he testifies to be accurate, to read the same by way of impeachment, instead of restricting the testimony to oral statements from recollection, after reading the minutes. See *Fisher v. Kyle*, 27 Mich., 454; *Spalding v. Lowe*, 56 Mich., 371, 23 N. W., 46; *Halsey v. Sinsebaugh*, 15, N. Y., 486. But in such a case the necessity for a proper foundation is not dispensed with, nor is it to be understood that the rule permits the impeaching witness to read anything that is not plainly and specifically contradictory of the witness to be impeached, in relation to the preliminary questions constituting the ground for impeachment. In this case the witness Wirth testified on cross-examination as follows: "A. I was sworn on the former trial of this case. I did not swear on the former trial of this case that, at the time those goods were thrown down out there in Grosse Pointe, Considine was not there. I did not swear in that case that when I came out, after I went in to get the goods, Considine was gone. On the former trial I swore that Hahn said to Considine at the boat house, 'Go and watch the horse, and be on the lookout.'" The impeaching question was, "I heard Gus Wirth testify on the former trial and have the shorthand minutes of that testimony taken by me. Q. Will you read from the minutes of his testimony on that trial his testimony with reference to what was said and done at the boat house at Grosse Pointe at the time he swore he (the defendant, Considine) and Gus Hahn were there? What the minutes would show does not appear. Apparently the witness was asked to read all that he testified about what was said and done at the boat house, not only by Wirth, but by others present. This testimony would have been hearsay, and inadmissible except so far as it rested on the previous question to Wirth. It was therefore proper to exclude the testimony under the question asked. *De Armond v. Neasmith*, 32 Mich., 231; 1 Greenl. Ev., § 462, and note. I think the judgment should be affirmed. (63 N. W. Rep., 197.)

PEOPLE v. WHITNEY et al.

(Supreme Court of Michigan. June 4, 1895.)

Intoxicating liquors—Local option—Unusual punishment—Information—Evidence—Credibility of witness.

1. Public acts 1889, No. 207, in providing as a punishment for the first offense of selling liquors unlawfully a fine of not less than \$50 or more than \$200 and costs or imprisonment in the county jail not less than twenty days or more than six months, and for every subsequent offense a fine of not less than \$100 nor more than \$500, and imprisonment in the State Prison for not less than six months or more than two years, is not in conflict with Const. Art. 6, § 31, as imposing excessive fines or unusual and cruel punishment.
2. Where, on the examination, the commission of a crime is shown to have been on a different date from that charged in the complaint, the information should follow the date shown on examination.
3. The prosecuting attorney is not a party to a criminal case, within How. St., §§ 6822, 7245, prohibiting a judge or justice of the peace from hearing any case when they are related to either party.

4. Public acts 1889, No. 207 (local option law), § 17, makes the record or a certified copy of the proceedings by the county board evidence that the provisions of the act are in force in the county. Section 14 provides that the regularity of the proceedings prior to the adoption of the prohibitory resolution by the county board shall not be open to question on a prosecution for a violation of the act. *Held*, that on a trial for an unlawful sale of liquor, a certified copy of the preamble and resolution by the county board is sufficient evidence of the existence of prohibition in the county, without proof of the regularity of the proceeding had prior to the adoption of the resolution.
5. The fact that the witnesses for the State on a prosecution for selling liquors unlawfully were hired to procure evidence of violation of the law may be considered by the jury in determining the credit to be given to their evidence.

Exceptions from circuit court, Allegan county; Philip Padgham, judge.

Charles E. Whitney and Ellis Aldrich were convicted for keeping for sale and selling liquor without a license, and bring exceptions. Affirmed.

Fred A. Maynard, Attorney General, and *F. E. Fish*, prosecuting attorney, for the people. *Ed. J. Anderson* (*H. H. Pope* and *H. Hart*, of counsel), for defendants.

LONG, J. Respondents were convicted upon an information charging that they "heretofore, to wit, on the 27th day of July, in the year one thousand eight hundred and ninety-four, at the village of Plainwell, in Allegan county, did then and there unlawfully keep a saloon and place where vinous, malt, brewed, fermented, spirituous, and intoxicating liquors and mixed liquors and beverages, a part of which was intoxicating, were sold, stored for sale and furnished as a beverage; they the said Charles E. Whitney and Ellis Aldrich not selling, storing for sale or furnishing such liquors as a druggist or registered pharmacist under and in compliance with the restrictions and requirements imposed upon druggists and registered pharmacists by the general laws of the State of Michigan, and such liquors not being wine sold for sacramental purposes nor pure alcohol sold or furnished by a druggist or registered pharmacist for medicinal, art, scientific or mechanical purposes; but such liquors were sold, stored for sale and furnished contrary to the provisions of a certain resolution adopted by the board of supervisors of the county of Allegan, State of Michigan, on to wit, the 26th day of February, A. D. 1894, in the pursuance of act No. 207 of the public acts of the State of Michigan for the year 1889. The aforesaid keeping a saloon and room where such liquors were sold, stored for sale and furnished by the said Charles E. Whitney and Ellis Aldrich was then and there done in violation of the provisions of said act No. 207 of the public acts of the State of Michigan for the year 1889, which was then in full force and effect in said Allegan county contrary," etc. Complaint was made against one Fred Rowe, as well as the two respondents. They all had an examination before the justice. The complaint and warrant charged the offense to have been committed on, to wit, the 30th day of July, 1894. On the examination the respondents were held for trial. The information was filed against the respondents, and the offense alleged to have been committed on July 27, 1894. The information was filed at the October term, 1894. Counsel for respondents moved to quash the proceedings, on the grounds: (1) That the information does not charge any crime under the laws of this State. (2) That it is not charged in the information that vinous, malt, brewed,

fermented, spirituous, or intoxicating liquors, or mixed liquors and beverages, a part of which was intoxicating, was either sold, stored for sale, or furnished as a beverage at the time the respondents are charged with keeping a saloon. (3) Nor is it charged that they or either of them sold, stored for sale, or furnished any of the liquors mentioned in act No. 207 of the public acts of 1889. (4) It is not charged that either of the respondents were not selling, storing for sale, or furnishing such liquors as a druggist or registered pharmacist may, under and in compliance with the restriction and requirements imposed upon druggists and registered pharmacists by the general laws of the State. (5) That the respondents have never been examined before a justice of the peace, as required by law, of the offense charged in the said information. (6) That the offense charged in the said information is one that is laid and occurred on a day different from that charged in the complaint in this case, and is a different offense from that charged in said complaint, and upon which examination was had in justice's court. (7) That said information should designate the building in which the room therein mentioned is situated. (8) It should also describe said room. The case against Rowe was *nolle prossed*. The motion to quash the proceedings was overruled.

The first contention is that act No. 207, public acts 1889, under which the complaint is made, is unconstitutional, as "it provides for excessive fines to be imposed, and caused cruel and unusual punishments to be inflicted, in violation of article 6, § 31, of the constitution of the State." Upon the legislature alone is conferred the power to fix the minimum and maximum of the punishment for all crimes. *People v. Smith*, 94 Mich., 644, 54 N. W., 487. It is true that cases might arise when the punishment imposed by an act is so cruel and unusual that the courts would interfere and protect the rights of the party, but in the present case the penalties fixed by the act are such as the legislature had the power to impose.

2. It is contended that, the date charged in the information being upon a different date than that charged in the complaint and warrant, a separate and distinct offense was charged than that which the parties were examined upon, and the information is therefore bad for that reason. There was some testimony on the examination showing the offense committed by the two respondents was upon the date charged in the information. The prosecutor was not bound by the date charged in the complaint and warrant. He had the right to inform against the parties for the offense committed on the date shown by the examination. *Annis v. People*, 13 Mich., 511. The averments in the information are sufficient under the statute, and we are unable to agree with counsel that it is defective upon the grounds stated in the objections. The complaint was made by Fidus E. Fish, prosecuting attorney of the county, before B. A. Nevins, a justice of the peace, who is a brother-in-law of Mr. Fish. It is contended that this rendered the proceedings before the justice void, under How. St., §§ 6822, 7245, prohibiting any judge or justice of the peace from hearing any case where he is related to either party in certain degrees by marriage or blood. The complainant is not a party to the suit, within the meaning of those provisions of the statute. *Parsons v. People*, 21 Mich., 509.

3. On the trial the prosecution offered in evidence a certified copy of the preamble and resolution of the board of supervisors, ordering prohibition in the county. This was objected to by the defendant on the follow-

ing grounds: "(1) That there is no evidence that the resolution was ever published as required by the statute. (2) The resolution prohibits the sale of wine for sacramental purposes, and does not state that anything therein contained shall not prohibit druggists and registered pharmacists from selling or furnishing pure alcohol for medical, art, scientific, and mechanical purposes, in accordance with section 2283¹/₂ of the statutes. These are objections I will state on record to the proceedings that lead up to the adoption of this resolution and the publication in it. (3) The call for the special session of the supervisors does not state when the petitions praying for an election were presented to the county clerk in order to show that the call was issued within five days thereafter, and to show that the date set in the call for the meeting of the board is not less than ten or more than twenty days from the presentation and filing of such petition, in accordance with section 5 of act No. 207 of the laws of 1889. (4) The notice of the call for a special session of the board of supervisors under section 5 of the act was not served upon the supervisor from the township of Saugatuck at least ten days before the time fixed for such meeting, and that he was not present at any time during such board meeting, as we will show by the records. (5) Said notice was not served upon the supervisor from the township of Saugatuck by causing a copy thereof to be delivered to him personally, or by leaving the same at his place of residence, as required by section 5 of the act, and that the return of such service is defective in that particular. (6) That the county clerk did not cause to be served upon and delivered to the clerks of the townships and voting precincts of this county, without delay, a certified copy of the order ordering and calling the election, as required by section 6 of the act. (7) Nor were such orders delivered personally to such clerks, as required by said section 6, as shown by the returns on the files here in the clerk's office. (8) The affidavit of publishing the order calling the election in the Allegan Journal is by Charles W. Kellogg, foreman, and it states that it was published for three successive weeks, and that the first publication was on January 5, 1894, and the last on January 26, 1894. We claim that such a state of facts could not exist, and that there could not be three successive weeks, and have the first publication on the 5th and the last on the 26th; that that skipped one week, and broke the continuity of the publication. (9) Such affidavit was not filed with the clerk of this court until February 26, 1894, being seven days after the election was held. (10) The affidavit of publishing such order, showing the publication to be in the Allegan Gazette, was by E. C. Reid, printer, and states that it was published for seven successive weeks; that the first publication was on January 6 and the last on February 17, 1894. We claim that it could not be published seven successive weeks, and have the first and last publications come upon these dates. (11) That affidavit was not sworn to or filed with the clerk of this court until after the election, to wit, filed on the 26th of February, 1894, at least seven days after the election was held. (12) That that affidavit as not sworn to and filed until after this resolution was adopted by the board of supervisors. (13) That the ballots printed by the county clerk, and furnished by him to the clerks of each township and voting precinct in the county, did not conform to section 8 of the act, nor to the resolution of the board calling the election, in that they were not in two separate forms and ballots, but the "Yes" and "No" ballots were published on one sheet of paper. (15) That the township clerks and the clerks of the voting precincts in the townships of Wayland, Otsego, Martin,

Leighton, and Ganges did not transmit and file with the county clerk within five days after the election any poll list or statement of the number of votes cast at their respective elections, as required by section 10 of said act. (16) That the affidavit of the publication of this resolution offered in evidence here is made by E. C. Reid, of said county, and shows that it was printed in the Allegan Gazette, a weekly newspaper printed and circulated in said county of Allegan, and that the resolution was published in said newspaper for four successive weeks; that the first of such publications was on the 3d day of March, 1894, and the last on the 31st. We claim that the affidavit is inconsistent with itself, and that it would be impossible to publish that notice for four successive weeks, and have the first publication and the last publication come upon those dates. We claim that the affidavit shows that a week was skipped, and the continuity of the publication was broken. (17) That that affidavit does not show that that resolution was published in that newspaper once in each week for those four successive weeks."

The resolution by the board of supervisors is as follows: "Whereas, an election was duly called by the board of supervisors of the county of Allegan, and held in and for said county, on Monday, the 19th day of February, A. D. 1894, under the provisions of act No. 207, of the public acts of 1889, approved June 29, 1889, to ascertain the will of the qualified electors of said county whether or not the manufacture of liquors and the liquor traffic should be prohibited within the limits of said county; and whereas, sufficient returns and statements of votes cast in the several townships (and precincts) in said county have been made to said board, as required by the act aforesaid; and whereas, said statements of votes have been canvassed by the said board, and the result thereof ascertained; and whereas said result was in the affirmative of the proposition to prohibit within said county the manufacture of liquors and the liquor traffic, the majority of the votes of the qualified electors of said county voting thereon, voting (Yes) in the affirmative thereof, said majority being 1,666; and the said board of supervisors, at a meeting held on the 26th day of February, A. D. 1894, having determined and declared said result aforesaid, and having entered said canvass of the votes, determination, and declaration of the result, together with a tabular statement of all the votes cast, in full upon the journal of their proceedings for that day: Now, therefore, be it resolved by the board of supervisors of Allegan county, that by virtue of the authority conferred upon them under the provisions of said act No. 207 of the public acts of 1889, entitled 'An act to prohibit the manufacture, sale, keeping for sale, giving away or furnishing of vinous, malt, brewed, fermented, intoxicating or spirituous liquors, or any mixed liquor or beverage, any part of which is intoxicating, and to prohibit the keeping of any saloon or other place for the manufacture, sale, storing for sale, giving away, or furnishing such liquors or beverages, and to suspend the general laws of the State relative to the taxation and regulation of the manufacture and sale of such liquors in the several counties of this State under certain circumstances, to authorize the qualified electors of the several counties in this State to express their will in regard to such prohibition by an election, and to authorize and empower the board of supervisors of the several counties, after such election, if they shall determine the result to be in favor of such prohibition, to prohibit the manufacture, sale, keeping for sale, giving away or furnishing of any such liquors, or the keeping of a saloon or any place for the manufacture,

sale, storing for sale, giving away or furnishing of the same within their respective counties, and to provide for penalties and rights of action in case of its violation,' approved June 29, 1889, it is hereby ordered that on and after the first day of May, one thousand eight hundred and ninety-four, the manufacture, sale, keeping for sale, giving away, or furnishing of any vinous, malt, brewed, fermented, intoxicating, or spirituous liquors, or any mixed liquor or beverage, any part of which is intoxicating, and the keeping of a saloon or any other place where such liquors are manufactured, sold, stored for sale, given away, or furnished, shall be and is prohibited within the limits of said Allegan county; that this resolution of prohibition shall take full effect within the said county of Allegan on the first day of May, one thousand eight hundred and ninety-four, aforesaid, that being the first day of May after its adoption; that on and after that said day it shall be unlawful within said county of Allegan for any person, directly or indirectly, himself or by his clerk, agent, or employé, to manufacture, sell, keep for sale, give away, or furnish any vinous, malt, brewed, fermented, spirituous, or intoxicating liquors, or any mixed liquor or beverage, any part of which is intoxicating, or to keep a saloon or any other place where any such liquors are manufactured, sold, stored for sale, given away, or furnished within the limits of said county of Allegan, so long as this resolution of prohibition remains unrepealed; and that on and after the said first day of May, one thousand eight hundred and ninety-four, the provisions of the general laws of this State for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving away, or delivering spirituous and intoxicating liquors, and malt, brewed, or fermented and vinous liquors, shall be and are suspended and superseded so far as relates to the territory and municipalities within the limits of said county of Allegan, so long as this resolution of prohibition remains unrepealed; provided, however, that all sales of liquors in said county by druggists or registered pharmacists shall be under the restrictions and requirements imposed upon them by the general laws of the State."

Section 17 of the local option law provides that, "on the trial for any violation of section 1 of the act, it shall be competent to introduce the record or a certified transcript thereof of the preamble and resolution,

* * * and such transcript shall be the evidence that the provisions of the act are in full force within the county."

In *Friesner v. Common Council*, 91 Mich., 504, 52 N. W., 18, it was said: "The plain purpose of this provision was to place the result, when once reached by the people, beyond controversy or collateral attack. As it would be competent to call an election of the voters of the county, or, indeed, to have named in the statute a day for an election to be had, it is likewise competent to empower the board to determine when the requisite facts exist which shall authorize them to call an election of the people. This having been done, and the people having acted, their action is final." And in *People v. Adams*, 95 Mich., 541, 55 N. W., 461, in speaking of proof on the trial, it was said: "It is unnecessary to prove the promulgation of the adoption of the preamble and resolution. Section 17 of the act makes a certified transcript of the record of the preamble and resolution evidence that the provisions of the act are in full force." These cases answer fully the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fifteenth objections of respondent's counsel.

But section 14 of the act, which requires filing copy with the secretary of State, specifically provides "that the record of such resolution of prohibition and of the publication of notice, and all duly certified copies thereof, shall be the evidence of the facts therein stated, so far as relates to the territory and municipalities within the limits of said county; and the regularity of any proceedings prior to the adoption of such resolution by the board of supervisors shall not be open to question on the examination or trial of any person for a violation of an provisions of section one of this act." We think the proof of the existence of the local option law within that county was sufficient.

4. The position taken that there was no evidence that the resolution was ever published as required by the statute has no force. The affidavit shows that the publication was for four successive weeks, and it complies with the requirements of the statutes.

5. The point that the resolution prohibits the sale of wine for sacramental purposes, and prohibits druggists or pharmacists from selling for purposes allowed by section 15 of the local option act, need not be considered here. It will be time to dispose of those questions when properly presented. Such questions do not affect the rights of the respondent, as the resolution may be proper with those provisions eliminated. The objections to the resolution were properly overruled by the court below.

6. Some question is raised as to the constitutionality of the act. Every provision of the act was under consideration in *Feek v. Board*, 82 Mich., 393, 47 N. W., 37, and it was there held that there was no constitutional objection to it. We have discovered no reason in the argument of the counsel for respondent for now holding otherwise.

7. We find nothing in the conduct of the court which warrants the criticism which counsel makes. The court, from the manner of the examination pursued, may have lost patience at the continued repetition of questions and objections, and have gone to some length in compelling counsel to desist; but that was a matter which the court below had a right to control in the orderly conduct of the business of the court.

8. Criticism is also made upon the witnesses for the people by whom the offense was sought to be proven. It is contended that they were hired to procure the crime to be committed. We think the evidence does not bear out this contention. They were paid to ferret out the crime, to ascertain if parties in that county were violating the local option law. As was said in *People v. Mills*, 94 Mich., 635, 54 N. W., 488: "It is the duty of police officers, not only to aid by all proper means in the arrest and conviction of criminals, but to detect and discover crime." The court charged the jury, in reference to these witnesses, that they might consider the fact that they were hired to go there, for the purpose of determining how far they were entitled to credit.

From a careful review of the case on the questions raised, we find that no error was committed which calls for reversal. The conviction must be affirmed.

MCGRATH, C. J., took no part in the decision. The other justices concurred. (63 N. W. Rep., 765.)

PEOPLE v. BURWELL.

(Supreme Court of Michigan. July 2, 1895.)

Continuance in criminal case—Sufficiency of application--Adding names of witnesses to information—Incest—Rape—Admission to bail.

1. The denial of a continuance is not ground for reversal, where the application did not state what defendant proposed to prove by the absent witnesses, and several of them testified.
2. Defendant was not prejudiced by the indorsement of the names of several witnesses on the information after it was filed where only one of such witnesses was sworn, and he was a person on account of whose absence defendant asked for a continuance.
3. To constitute the crime of incest, the assent of both parties is necessary.
4. Const. Art. 6, § 29, provides that all persons shall before conviction be bailable except for murder and treason. 2 How. Ann. St. § 9479, authorizes justices of the peace to let to bail in all cases where the punishment for the offenses charged shall be less than imprisonment for life. *Held*, that a justice may admit to bail a person charged with rape, the punishment for which is imprisonment for life or any number of years.
5. On trial of a father for the rape of his daughter, evidence that defendant was abusive to his wife and other children is admissible to show that prosecutrix yielded under fear of her father.

Error to circuit court, Sanilac county; Watson Beach, judge.

James R. Burwell was convicted of rape and brings error. Affirmed.

Phillips & Jenks, for appellant. *Fred A. Maynard*, Attorney General, for the people.

GRANT, J. The respondent was convicted of the crime of rape upon his own daughter. The complaint and warrant charged both rape and incest. The evidence upon the examination was sufficient to justify the magistrate in binding him over to the circuit court for trial upon the charge of rape. It would not sustain the crime of incest upon the ground of the mutual consent of both the parties. The respondent introduced no evidence upon the examination. The testimony of the complaining witness was the sole evidence upon which the magistrate was justified in holding him to the circuit court for trial. This testimony is found in the record, and is as follows: "There was no one present except myself and father, and he proposed what he wished to do, and I refused, and said I was not willing. He said there was no use of me refusing. He said I had to do just as he said. He said he knew better what was good for my health than I did, and that was what was good for my health; and when I cried, and said I did not want to give up, and did not want to do any such thing, he said there was no use of my acting so or making a fool of myself, that I had to do as he said; and, when I refused again, he took hold of my arm, and led me part of the way, and then he pushed me the other part of the way, into the bedroom, and ordered me to sit down on the bed, for he wanted to talk with me. He said he wanted to explain to me, and to stop crying, as there was no use of my crying. Then he ordered me to lay down on the bed; and, when I refused to, he told me to again in cross words. I done so, because I was afraid of him, and I did not dare to refuse any further. Well, he done just as he pleased, and I

could not help myself." This testimony excludes the theory of consent upon her part. The magistrate did not specify in his return for which crime he held him, but stated that it appeared that the offense as charged had been committed, and found probable cause to believe the respondent guilty thereof.

The information contained two counts—one for rape, and one for incest. He refused to plead, and a plea of not guilty was entered by order of the court. Afterwards he moved to quash the information, for the reason that it contained inconsistent counts. This motion was overruled, but the court required the people to elect upon which count they would proceed to trial. They elected the count for rape. The respondent further objected to proceeding to trial for the reason that he had had no preliminary examination for this charge. This objection was overruled. He then moved for a continuance, which was denied.

1. The application for a continuance was within the discretion of the circuit judge. The application did not state what he proposed to prove by the witnesses whose presence he desired. Several of them were produced and testified. *People v. Anderson*, 53 Mich., 61, 18 N. W., 561; *People v. Foote*, 93 Mich., 40, 52 N. W., 1036.

2. The respondent was not prejudiced by the action of the prosecuting attorney in failing to indorse upon the information, at the time of filing it, the names of all his witnesses. Only one witness whose name was afterwards indorsed was sworn on behalf of the people, and he was one of those whose presence the respondent desired, according to his affidavit for a continuance.

3. It is settled in this State that the assent of both parties is required to establish the crime of incest. *People v. Jenness*, 5 Mich., 321; *De Groat v. People*, 39 Mich., 124. There are many decisions to the contrary. See 10 Am. and Eng. Enc. Law., 339, and note 5, and authorities there cited. The crime is purely statutory, and the statute in this State is found in *De Groat v. People*, *supra*. The conflict in the decisions may possibly be accounted for by the difference in the language of the statutes.

Objection is made that the information contained two counts, setting forth two distinct crimes; that the respondent had no examination upon the charge of which he was convicted. The reason relied upon by counsel for respondent to sustain this claim is that the justice had no jurisdiction to admit the respondent to bail upon the examination for the crime of rape. In this we think the learned counsel are in error. The constitution (article 6, § 29) provides that "all persons shall, before conviction, be bailable by sufficient sureties, except for murder and treason, when the proof is evident or the presumption great." 2 How. Ann. St., § 9479, authorizes justices of the peace to let to bail in all cases where the punishment for the offense charged shall be less than imprisonment for life in the State's prison. The punishment provided for the crime of rape is imprisonment for life or any number of years. Under these provisions, the justice had authority to fix bail for the respondent when he bound him over for trial. *Brownell v. People*, 38 Mich., 734. The transaction for which the respondent was tried is identical with the transaction for which he was examined. The offense for which he was tried and convicted was set forth in the complaint and warrant. We think the case is ruled by *People v. Annis*, 13 Mich., 515, and *People v. Aikin*, 66 Mich., 460, 33 N. W., 821 and that no error was committed in refusing to quash the information.

4. No such physical force was used as is ordinarily required to constitute the crime of rape. The claim of the prosecution was that the prosecutrix yielded on account of threats and fear. Evidence tending to show that he had abused and beaten her before, that he was abusive to his wife and other children, and the language used on these occasions, were competent and important for the jury to consider in determining whether she yielded under those circumstances, which under the law are the equivalent of force. We find no error, and the judgment is affirmed. The other justices concurred. (63 N. W. Rep., 986.)

PEOPLE v. OSCAR.

(Supreme Court of Michigan. July 2, 1895.)

False pretenses—Complaint and information—Defenses.

1. An information for an offense charged in a complaint may set out facts relating to the offense, brought out on examination, which were not set out in the complaint.
2. On a prosecution for obtaining money under false pretenses, the fact that the defendant is able and willing to repay the money so obtained is no defense.
3. A complaint which alleges that defendant, for the purpose of obtaining a loan on certain property, represented that there was a house thereon of the value of \$1,200, but that in fact there was none, charges a criminal offense.

Exceptions from circuit court, Ionia county; Frank D. M. Davis, judge.

Charles Oscar, Jr., was convicted of obtaining money under false pretenses, and excepts. Affirmed.

Fred A. Maynard, Attorney General, and *R. A. Hawley*, prosecuting attorney, for the people. *Burbank & Peake* (*A. A. Ellis* and *Charles P. Locke*, of counsel), for defendant.

MCGRATH, C. J. Respondent was convicted of obtaining money upon false pretenses. The complaint set forth that defendant, with intent to cheat and defraud one Seig, and fraudulently obtain from him \$350, applied to one Seig for a loan of said amount, and did represent that he was the owner of a one-half interest in two lots of land, and to induce Seig to loan him the said \$350, and to take a mortgage as security on said lots, and with intent to cheat and defraud said Seig, he represented that "the said lots were of the value of \$1,200, and that there was then and there and at that time a house of the value of \$1,200 on said lots. * * * Whereas, in truth and in fact, at the time the said Charles Oscar, Jr., made the said false and fraudulent representations aforesaid, said lots were not worth the sum of \$1,200, and were not worth to exceed \$100. There was not then and there any house whatever on said lots." The warrant and return of the justice set forth the offense in the same language. An examination was had, and the defendant bound over. The justice made return that, "it appearing to me upon the examination of said Charles Oscar, Jr., that the offense so charged in the complaint and the warrant,

as aforesaid, has been committed, and that said offense is not cognizable by a justice of the peace, and that there is probable cause to believe the said Charles Oscar, Jr, to be guilty of the commission thereof, I," etc. The information charged, in addition to what is set forth in the complaint, warrant, and return, that defendant represented "that the said lots were of the value of \$1,200, and that there was then and there and at that time a new house of the value of \$1,200 on said lots, and that said house was new, and that it cost more than \$1,200 to build the same." Upon the arraignment of the respondent, his attorneys moved to quash the information, for the reason (1) that respondent had never had any preliminary examination of and concerning said charges in the said information, and had never waived the same; and (2) because the original complaint charged no offense known to law. The motion was overruled.

The court was right in denying the motion. The complaint alleged, in substance, that there was a house of the value of \$1,200 upon the lots, whereas there was in fact no house thereon. The complaint did set forth an offense of which the statements alleged to have been made by respondent respecting values, which might be regarded as mere opinions, were not essential elements. The additional matter set up in the information, as brought out upon the examination, related to that offense and was a part of the same transaction. *People v. Annis*, 13 Mich., 510. The testimony clearly tended to show that there was no house, in the sense that the word is generally used, upon the premises; that the dwelling upon the lots had been destroyed by fire some time before; that the premises were situate in a distant county, and that there was upon the lots an old building, the estimated cost of the construction of which was \$30. The court instructed the jury that the representations as to value were not material allegations for the purpose of obtaining a conviction upon, and that "as to whether he made a statement of its value (referring to the value of the lots), and as to what its true value may be, is only a circumstance to be considered by you in determining the intent with which he made the other statement,—as to there being a new house upon the land, and what it cost to build it."

Complaint is made that the court instructed the jury: "Something has been said, gentlemen, about this man having other property, and about Seig not commencing any private action to recover his money. It matters not whether respondent had any other property or not, in this case. If he made the false pretenses as claimed by the people, in the manner claimed by the people, he is guilty, if they have established it beyond a reasonable doubt. The crime charged was the false pretenses in regard to this particular property, not in regard to something else. Mr. Seig was entitled as a man and a citizen in the reception of that mortgage, to the truth in regard to the security that was being offered. A man cannot come in at a later day, if he is guilty, and excuse his guilt or wipe it away by saying, 'I had other property; if you had chosen you could have sued me and recovered.' Mr. Seig was not obliged to do that. I speak of that, gentlemen, in connection with the fact that something has been said by counsel in regard to it." This instruction states the correct rule.

Seig declined to part with his money unless its payment was secured. The offer of security, which was represented to be ample, was the means employed to induce him to part with his money. As is said in *Com. v. Coe*, 115 Mass., 481, 502: "The offense consists in obtaining property from another by false pretenses. The intent to defraud is the intent, by

the use of such false means, to induce another to part with his possession and confide it to the defendant, when he would not otherwise have done so. Neither the promise to repay nor the intention to do so will deprive the false and fraudulent act in obtaining it of its criminality. The offense is complete when the property or money has been obtained by such means; and would not be purged by subsequent restoration or repayment. Evidence of the ability to make the repayment is therefore immaterial and inadmissible. The possession of the means of payment is entirely consistent with the fraud charged. The evidence offered on this point did not touch the question of falsity and fraud of the means by which the loan was obtained, and was properly rejected."

The conviction is affirmed. The other justices concurred. (63 N. W. Rep., 971.)

PEOPLE v. RATHBUN.

(Supreme Court of Michigan. July 2, 1895.)

Motion in arrest of judgment—Review—Indictment for aiding an escape—Sufficiency of—Amendment.

1. The denial of a motion in arrest of judgment will be reviewed on appeal, though the trial judge assigned no reason for his ruling.
2. An information under How. Ann. St., § 9245, making it a penal offense to "convey into any jail" any instrument adapted to aid any person lawfully committed in escaping, with intent to facilitate his escape, which alleges that the instrument was conveyed "unto" the jail, is fatally defective, and cannot be amended under How. Ann. St., § 9537, permitting an indictment to be amended in all cases where the variance between the facts alleged in the indictment and those proven are not material to the merits of the case. GRANT, J., dissenting.

Error to circuit court, Van Buren county; George M. Buck, judge.

Edwin N. Rathbun was convicted of unlawfully conveying to a jail an instrument adapted to aid the escape of a person confined therein, and brings error. Reversed.

Heckert & Chandler, for appellant. *Fred A. Maynard*, Attorney General, and *Lincoln H. Titus*, prosecuting attorney, for the people.

MONTGOMERY, J. Section 9245 of Howell's Annotated Statutes provides that "every person who shall convey into any jail, prison, or other like place of confinement, any disguise, or any instrument, tool, weapon or other thing, adapted or useful to aid any prisoner in making his escape, with intent to facilitate the escape of any prisoner there lawfully committed or detained, * * * shall be punished," etc. The information in this case charged that the respondent, on the 26th day of October, 1893, "did feloniously and unlawfully convey unto the jail aforesaid, to wit, four keys, being adapted and useful to aid any prisoner in making his escape, with intent to facilitate the escape of said George W. Duell from said jail, he being such prisoner as aforesaid." The respondent was

convicted, and, after conviction, moved in arrest of judgment, alleging, as one ground for the motion, that the information did not cover the offense defined by the statute. The motion for arrest of judgment was overruled. It is contended by the counsel for the people that under the rule laid down in *McRae v. Lumber Co.* (Mich.), 60 N. W., 967, this question cannot be passed upon in this court, for the reason that the circuit judge, in refusing a new trial, did not give his reasons. That case, however, was based upon a statute relating to a review of motions for a new trial. In the present case the question raised is one which was open to review by the court before the enactment of this statute. A motion in arrest of judgment has always been proper practice in a criminal case. We think this motion should have prevailed. How. Ann. St., § 9537, permits an amendment in the name of any county or place stated in the indictment, in the name or description of any person or body stated to be the owner of any property which is the subject of the offense charged, in the christian or surname of any person, in the name or description of anything in the name or description of any writing, in the ownership of any property described in the indictment "and in all cases where the variance between the facts alleged in the indictment and those proven by the evidence are not material to the merits of the case." Section 9539 provides that, when the offense charged has been created by any statute, the indictment shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describes the offense in the words of the statute. The practice of the court has been liberal in allowing amendments under section 9537 in the particulars especially authorized by statute. See *People v. Hamilton*, 76 Mich., 212, 42 N. W., 1131; *People v. McCullough*, 81 Mich., 25, 45 N. W., 515; *People v. Waller*, 70 Mich., 237, 38 N. W., 261; *People v. Mott*, 34 Mich., 81. It is very clear that the respondent might have been guilty of all the acts charged in the information, and yet not be brought within the terms of the statute defining the offense. Were the defect the mere omission of a word which is necessarily implied from the text, it might be supplied by amendment, or the omission overlooked. *Garvin v. State*, 52 Miss., 207. But such is not the case here. The judgment will be reversed, and respondent discharged.

MCGRATH, C. J., and LONG and HOOKER, JJ., concurred.

GRANT, J. (dissenting). Respondent was convicted under section 9245, How. Ann. St. The information was filed and conviction had under the first clause which makes it an offense to "convey into any jail, prison, or other like place of confinement, any disguise, or any instrument, tool, weapon or other thing, adapted or useful to aid any prisoner in making his escape, with intent to facilitate the escape of any prisoner there lawfully committed or detained." The record contains many assignments of error, but they are grouped by respondent's counsel under two heads, and we will treat them in the same way.

1. The complaint charged respondent with carrying unto the jail certain keys, etc. The warrant and information followed the complaint in the use of the word "unto" instead of "into." It is now insisted that the word "unto" has a different meaning from "into," and that, therefore, no offense is charged. This question was raised for the first time by a motion in arrest of judgment. The court, in its instruction, used the

word "into," and it is apparent that throughout, the trial was conducted upon the understanding that the offense was properly set forth. Had the attention of the court been called to it, an amendment would have been allowed. The objection, even if it were good, comes too late.

2. It is insisted that no offense was established by the proofs. Respondent had just completed the service of a sentence in the jail. Early in the evening of the day of his discharge, he appeared at the entrance door of the jail, in the hall running east and west. The jail proper was on the north side of this hall, and the living rooms of the jailer were on the south side. There was another entrance to the jail on the west, which opened into a yard with a high board fence around it. The evidence on the part of the people showed that respondent requested one Frank Ormsbee to accompany him to the jail, and play for the inmates on an instrument called a "mouth organ." Ormsbee went, and, while he was playing, respondent was talking with the prisoner whom, it is claimed, he was trying to assist in escaping. After talking with him a few moments, respondent went into the residence portion of the jail, and returned with a bunch of keys, with which he tried to open the jail door. The keys could not be passed inside the room where the prisoners were confined, because of a strong wire netting over the bars of the door. A bunch of jail keys disappeared from the jail that day. It contained the keys which opened the west door, but not the south door, the usual entrance. Respondent was familiar with the residence portion of the jail, and there is evidence from which it may be inferred that he knew where the keys were usually kept. Respondent testified that in a joke he took a key from his pocket, and made a mock attempt to open the door. The real purpose of respondent was the proper subject of inquiry and determination by the jury. The obtaining of the keys, and bringing them to the door, with the intent to use them himself, or to let others use them, to assist an escape, was a bringing into the jail, within the meaning of the statute. The hall must be considered a part of the jail. The fact that they would not unlock the door is not conclusive that they were not adapted or useful for the purpose intended. The law does not mean that the keys or other tools must be so nicely made as to accomplish the escape with the least possible delay or effort. The law means such tools as, when properly constructed, are adapted or useful for the purpose. If one secures or makes a key which he believes is or may be adapted or useful for the purpose and conveys it into the jail with the evil design described in the statute, it would be a strange rule which would acquit him because the key would not fit. I find no error, and the conviction should be affirmed. (63 N. W. Rep., 973.)

PEOPLE v. SAYERS.

(Supreme Court of Michigan. July 2, 1895.)

Assault—Evidence—Charge.

On trial for assault it appeared that the prosecuting witness was engaged, under the commissioner of highways, in taking up a drain built by defendant across a road; that the defendant came up, and demanded by whose authority the work was being done, and the commissioner replied that it was being done by his authority; He demanded that it cease, and, turning to the prosecuting witness, stated that the witness was to blame for the taking up of the drain, and that he ought to make him a corpse. The commissioner told defendant to let his men alone, and directed them to proceed with the work. The assault consisted of threatening gestures made by defendant to the prosecuting witness. *Held*, that it was proper to charge that there was no evidence to indicate that defendant, in making whatever demonstrations he did make, was undertaking to prevent the parties from unlawfully taking up the drain, but that it indicated that he looked to the prosecuting witness as the author of the trouble, and that the demonstrations were not made for the purpose of preventing the taking up of the drain. McGRATH, C. J., and LONG, J., dissenting.

Error to circuit court, Tuscola county; Watson Beach, judge.

Sidney Sayers was convicted of assault and brings error. Affirmed.

S. B. Gaskill, for plaintiff in error. *Fred A. Maynard*, Attorney General, and *T. W. Alwood*, prosecuting attorney, for the people.

GRANT, J. I think the conviction in this case should be sustained. The question whether the demonstration made by respondent towards Griffin amounted to an assault was left to the jury under a clear and fair charge. Respondent denied that he made an assault. If his version was true, he should have been acquitted. If the people's version was true, he was properly convicted, unless the assault was justifiable. The court said to the jury: "There is no evidence to indicate that Mr. Sayers, in making whatever demonstrations he did make, was undertaking to prevent the parties who were there—either Mr. Griffin or any one else—from taking up the tile or drain, but that on the contrary, from his language, it indicated that he looked to Griffin as the author of the trouble, and that the demonstrations were not made for the purpose of preventing the taking up of the drain; and consequently the theory of the effort to prevent its being taken up, under the evidence, falls to the ground." If the evidence sustains this instruction, the conviction was correct. The work was being done under the direction of Mr. Connor, the highway commissioner. He had procured several men to assist him, including Mr. Griffin. According to the testimony of all the witnesses, Mr. Sayers, upon his arrival, jumped out of his cutter, and asked by whose authority the work was being done. Connor replied that it was by his authority, and Sayers then made the demonstration towards Griffin, as the supposed instigator of the work. Sayers' story is as follows: "When I got to the sluice I asked by whose authority that was being taken up. Mr. Connor answered, by his. I said, 'I forbid your taking that up,' and the men stopped, and he said 'Take it up,' and they took it up. I said, 'If you take it up, I will prosecute you,' and he says, 'Tear it up, any way to get it out, and smash it,'

and I says, 'If you smash it, you'll pay for it.' I said to Griffin: 'Here is the — that is to blame for this being taken up. I ought to make a corpse for a Patron funeral.' At the same time I used a gamble to point out the natural water course as it ran in a state of nature. I told Griffin the water ran down on the west side of the road and across his orchard, and I told him, if he would ditch his own farm, and leave mine alone, he would be better off. I told Griffin to mind his own business, and leave mine alone. Connor put his hand on my shoulder, and said: 'Sayers, let my men alone. I want them to work.' And I stopped, and went away home." I think the record contains no evidence to show that the demonstration made by Mr. Sayers towards Mr. Griffin was made for the purpose of preventing the taking up of the drain, and that, therefore, the instruction was correct. Griffin was present in the capacity of a hired man. He had no control over the work. Sayers recognized the authority of Connor and made no demonstration towards him, nor towards Griffin until Connor had directed the work to proceed. He did nothing to prevent the accomplishment of the work, except to warn Connor not to do it. Judgment affirmed.

HOOKE and MONTGOMERY, JJ., concurred.

MCGRATH, C. J. (dissenting). Respondent was convicted of an assault upon one Griffin. Sayers owned lands on both sides of the highway, and had constructed a culvert across the highway to carry the water from the east to the west side. Griffin owned lands immediately north of those of respondent, the southerly line of which was some ten or twelve rods north of the culvert. The testimony was undisputed that the culvert was in the line of the natural course of the water; that an attempt had been made to carry the water along the east side of the highway, but the ditch had not been sufficient, and the water backed up upon respondent's lands; that respondent had previously complained to the highway commissioner, had stated that he intended to make the culvert, and had asked the commissioner to make provision for carrying the water in its natural course along the west side of the highway, and then westerly; that the fall from the east to the west side of the road is fourteen inches; that the natural course of the water is northwesterly, and at a point twelve rods northwesterly from the culvert at Griffin's line fence there is a fall of four and one-half feet; that when respondent bought his farm, some twenty years before, there was a culvert across the road; that respondent had attempted to carry the water along the east side of the highway, and for that purpose had constructed the ditch on that side of the highway; that the ditch did not serve the purpose; that the old culvert had been taken up in 1879 or 1880. At the time of the alleged assault the highway commissioner, with Griffin and others, was engaged in tearing out the culvert. It appeared from the testimony of the commissioner that he acted at the instigation of Griffin. The commissioner testified: That while engaged in the work respondent came up. That he had a gamble stick in his hand. That he stepped up to where they were taking up the ditch and says: "By whose authority is this being taken up?" And at that time I don't think he saw me. I turned to him and told him it was by my authority. He said to Dorrity (one of the others engaged in the work) 'You are interested in this business are you?' And Dorrity said 'No.' He then turned to Griffin and said to him: 'You are the son of a — that is the cause of this—of having this commissioner brought down here—are you?' And he jumped and sprang with his stick—this hog gamble—in his hand and says: "—"

your — soul! I will make a Patron corpse of you right here.' Griffin backed up to the other side of the ditch and Sayers followed him and swung his club. I slapped Sayers on the shoulder and told him to stop—that all the men were working under my instructions. He said to me as he said before that Griffin was the cause of my being there. * * * * When I told Sayers to stop he stopped. Sayers come close to Griffin. I was not a bit frightened. I did not think he was going to strike Griffin. He did not strike at him. He was so close to him that he could put his hand on him. He might have been talking about water courses. He said something about water courses. He told Griffin that if he would drain his own farm he would not have any trouble; 'Drain as I do.' He was talking about the drainage all of the time with this club over his head. This water had not done any damage to the road yet. * * * * I went to see it and discovered that Sayers had dug across the highway between his two farms and let the water across to the west side and had dug down the west side I should think six or seven rods and left a ditch and stopped on the west side of the road. He had dug across the highway and thence north to the quarter line to Griffin's land. The effect it had upon the water that passed down the ditch was that it took it across the road to the west side. There was no provision on the west side as I saw for carrying the water in the ditch there. There was provision made on the east side of the road from Sayers' corners down to Allen's corners on the township line. The ditch is four or five feet deep and five or six wide. It was cleaned out last spring. Sayers turning the water into the west side of the highway resulted in an injury to the highway. There was no provision to take the water away and by having the sluice; and there was no need of it and that would be an injury to construct a sluice across the highway where there was no need of it. I saw no necessity for the sluice. I saw no provision for carrying the water away to the north. * * * * Sayers did not show me where he was taking the water to. The water was running under the highway at that time. There was not much water—not enough to affect Griffin's land. There was no ditch on the west side of the road. I think the water was running in a northwest direction across Griffin's farm. There was a small ditch that would carry part of it. The banks was graded there. I did not examine it. I examined the west side of the road till there was no provision for it to run. I did not look further. At some time it might be a damage to the highway if the sluice got stopped up and the water would naturally wash the highway and the planks would get rotten." Griffin testified that: "He said he would smash me and and chuck me in the ditch. He came at me as though he intended to carry out the threat. He said a good deal but I was more interested in his actions than in his words so I don't remember what he said. When he came at me as though he was going to strike me I raised my spade to ward off the blow if he should strike. I backed up, and he followed me until the commissioner told him to stop." John Dorrity says: "Mr. Sayers said to Connor that he forbade him taking up that sluice unless he gave him an outlet on the east side of the road. Connor said he would make an outlet when he got to it. Sayers said he wanted it immediately." Charles Dorrity says: "Sayers says to Griffin 'I ought to smash your head and I can do it.' Sayers did not strike at him."

Defendant's counsel presented the following requests which were refused: "That it is the natural servitude the lower land owner owes to

the upper land owner to receive the natural flow of water and he is bound by law so to do. That the defendant had a proprietary right of ownership to the water upon his land and being the owner of the soil in the road, as well as upon the side of the road, he had a right to conduct this water in a drain under the road if he did it in a manner so as not to interfere with the rights of the public, or to the damage of the highway. That this is a fact for the jury to determine, whether this drain was an injury to the highway. That the power of the highway officers is confined entirely to draining and improving the highway and they have no right to construct drains for the improvement or protection of private lands. If the jury believe the fact to be that the highway commissioner and Griffin were tearing up this drain because the water thereupon would flow upon and damage Griffin's land, then they would not be protected by the law." The court instructed the jury as follows: "Now a great deal of testimony has been put into the case under the theory that there was some justification if an actual assault was committed or whatever demonstration was there made, there were circumstances which justified it all on the theory that the defendant had been undertaking to conduct his water lawfully across the highway in the direction which he did, and that whatever he did on that occasion on that day was to prevent a trespass. My own judgment of the evidence here as we have it is that these facts have no particular or material bearing upon the question at issue here for the reason that none of the witnesses can give any evidence which indicates that Mr. Sayers, when he was making the demonstrations—whatever demonstrations he did make—was undertaking to prevent the parties who were there, either Mr. Griffin or any one else, from taking up the tile or drain, but that, on the contrary, from his language, it indicated that he looked to Griffin as the author of the trouble, and that the demonstrations were not made for the purpose of preventing the taking up of the drain, and consequently the theory of the effort to prevent the taking up of the drain, under the evidence, falls to the ground. There seems to be no warrant in the evidence, or under the evidence, for this theory; and while the evidence may explain Mr. Sayers' right to be there, and his interest in the drain, and his objections to its being taken up, yet, as I say, the evidence does not disclose that whatever demonstrations he made towards Mr. Griffin had the end in view of preventing the drains being taken up. Consequently, the right or the wrong of Sayers' action there, or the right or wrong of Griffin's presence there, his acts under the circumstances, have no material bearing upon the real question at issue, as to whether an assault was committed there or not." The court erred in the refusal to instruct as requested, and in the instructions given. There was testimony from which the jury might have found that the highway commissioner was acting in the interest of Griffin, and not in the interest of the highway or the public. A highway bed is not a natural obstruction to the course of surface water. Culverts are necessary incidents of highway construction, and a highway commissioner cannot justify the destruction of a culvert on the line of a water course on the ground that it might become clogged or out of repair. The culvert is not, *per se*, a nuisance, no more than was the tree in the case of *Clark v Dasso*, 34 Mich., 86. The conclusion of a highway commissioner as to the necessity of doing an act to improve or protect the highway, honestly arrived at, may not be reviewable by the courts, but he must keep within the sphere allotted to him by statute. He cannot, under color of power to preserve the highway,

go outside, and undertake to adjust and determine matters involving private rights. In *Conrad v. Smith*, 32 Mich., 429, a bill was filed to restrain the cutting by highway commissioners of a ditch along the highway. The defendant insisted that the object was the improvement of the highway. The court said that, notwithstanding the claims that the projected drain was meant to be a mere highway ditch, the facts did not bear them out; that the case did not serve to show the semblance of need for the ditch on account of the road. "In connection with these considerations," say the court, "it must be observed that the mind cannot avoid the impression, after an examination of the case, that the real motive was not to benefit the highway, but to help surrounding lands, and that the power given the defendants, as highway officers, was made a pretext for attempting what the laws governing such officers do not warrant." The court say, further, that the proposed drain was "an unlawful invasion of complainant's land within the road limits." In *Cubit v. O'Dett*, 51 Mich., 347, 16 N. W., 679, the action was case against the overseer of highways for flooding plaintiff's land by means of a ditch cut along the highway, which had the effect, while draining the lands of defendants, to cast upon plaintiff's land a large amount of water, which otherwise would not have flowed in that direction. The defense claimed that the cutting of the ditch was rightful, because done under the direction of the overseer of highways; but it was held that highway authorities have no more right than private persons to cut drains, the necessary result of which will be to flood the lands of individuals. See, also, *Shue v. Highway Com'rs*, 41 Mich., 638, 2 N. W., 808; *Clark v. Dasso*, *supra*. The defendant's right to have and maintain the culvert was a matter which should have been submitted to the consideration of the jury, and if they found that it was constructed on the line of the natural water course; that it was necessary, in order to prevent the water from backing up upon defendant's land; and that the commissioner was acting, not with reference to the protection of the highway, but in the individual interest of Griffin, defendant's acts were justifiable. *People v. Foss*, 80 Mich., 559, 45 N. W., 480. The conviction should therefore be set aside, and a new trial awarded.

LONG, J., concurred with the CHIEF JUSTICE. (63 N. W. Rep., 1002.)

PEOPLE v. FAIRCHILD.

(Supreme Court of Michigan. May 21, 1895.)

Diversion of township funds.

On the trial of a township supervisor, charged with converting money appropriated by the supervisors for township roads and bridges, and using the same to bribe voters, the court directed a verdict of conviction, on proof that the appropriation had been made, and that defendant had drawn the sum appropriated from the treasurer. *Held*, error to refuse to allow defendant to show that the money had been legally expended, on the theory that the appropriation was unlawful.

Exceptions from circuit court, Bay county; Andrew C. Maxwell, judge.

Clarence L. Fairchild was convicted of larceny, and appeals. Reversed.

Simonson, Gillett & Courtright, for appellant. *Fred A. Maynard*, Attorney General, and *Isaac A. Gilbert*, prosecuting attorney, for the people.

MONTGOMERY, J. The respondent was convicted on an indictment charging that he was, in the year 1892-93, supervisor of the township of Mt. Forest, Bay county; that at a meeting of the board of supervisors in October, 1892, a committee report, recommending that there be appropriated from the contingent fund of Bay county the sum of \$300, to the township of Mt. Forest, to be expended by the supervisor of the township, was adopted. The indictment then proceeds as follows: "And that the said Clarence L. Fairchild afterwards received from the county treasurer of Bay county the said sum of \$300; that he, the said Clarence L. Fairchild, did not use the said sum of \$300 for the purpose of improving the roads and bridges in the township of Mt. Forest aforesaid, but unlawfully and fraudulently did afterwards, to wit, a few days before the annual spring election in the month of April, A. D. 1894, with intent to secure his reelection as supervisor of said township, and with intent to defraud the people of the county of Bay, hire and engage a large number of non-residents to go to the township of Mt. Forest, to register as voters therein, and to vote for him, the said Clarence L. Fairchild, as such supervisor; that the sum of \$300, or the greater part thereof, was used by the said Clarence L. Fairchild for no other purpose than securing his reelection as aforesaid, and not for the purpose contemplated by the board of supervisors when said appropriation was made. And the grand jury, therefore, say that he, the said Clarence L. Fairchild, did then and there receive, and that there was then and there delivered to him, the said Clarence L. Fairchild, \$300 in money, of the value of \$300 in money, of the goods, chattels, and property of the county of Bay, and that he, the said Clarence L. Fairchild, did then and there, in manner and form as aforesaid, fraudulently convert the said \$300 to his own use." On the trial the prosecution proved the adoption of the committee report, and that respondent received the money from the county treasurer on an order drawn by the clerk, and this proof was deemed by the circuit judge sufficient to warrant a conviction. The defense offered to show affirmatively that the money was expended in good faith on the roads of the township, but this testimony was refused, and the circuit judge directed a verdict of conviction. The conviction was clearly against the rights of the respondent. The view of the circuit judge seems to have been that the order of the board of supervisors was unauthorized, and that, therefore, it was immaterial how the money was expended. But the indictment is not framed on any such theory. The gist of the offense charged is very clearly that of diverting the fund from the source to which it was devoted by this order of the board, and its use for corrupt purposes, the indictment treating the order of the board as fully authorized and valid. The conviction will be set aside and a new trial ordered. The other justices concurred. (63 N. W. Rep. 436.)

PEOPLE v. BAUMAN.

(Supreme Court of Michigan. May 28, 1895.)

Embezzlement—Criminal intent.

A charge that the mere retention of money by defendant employé, or its expenditure for the purposes of the employer in excess of the amount agreed upon for expenses, was sufficient to authorize a conviction, without reference to the necessity of a criminal intent on defendant's part, was erroneous.

Error to recorder's court of Detroit; William W. Chapin, judge.

Steve Bauman was convicted of embezzlement, and brings error. Reversed.

James V. D. Willcox (*E. F. Bacon*, of counsel), for appellant. *Fred A. Maynard*, Attorney General, and *Allan H. Frazer*, prosecuting attorney, and *Ormond F. Hunt*, assistant prosecuting attorney, for the people.

HOOKEE, J. The defendant appeals from a verdict and sentence upon a charge of embezzlement. He sold cigars for the complainant, and was authorized to make collections. Incidental expenses, such as money used in saloons, were adjusted from time to time, but he was expected to make reports of collections and expenses at short intervals, if not daily. The testimony introduced on behalf of the prosecution tended to show that the defendant had collected moneys from customers which he had failed to report and had denied receiving, and that he was short upward of \$100. The testimony for the defendant does not dispute a possible shortage, but tends to establish the facts that there was no intentional concealment; that it was usual for him to appropriate some of the money collected, and apply it upon his salary; that he was sometimes overpaid, or had drawn or used to the extent of \$75 or \$100 in advance of his earnings; but that it was never with the fraudulent or felonious design of cheating or defrauding his employer.

In his charge to the jury the court said: "He is charged with not having done that; that is to say, with not having turned in the moneys which he collected. Now if you find from the evidence in this case that he retained these moneys, it is not necessary that he appropriate them to his own use. If he retained the moneys, if he made these collections, and kept them, if you are satisfied beyond a reasonable doubt that that is the case, then, of course, it will be your duty to convict, and your verdict will be guilty. * * * If you are satisfied from the evidence in this case, beyond a reasonable doubt, that the defendant did make these collections, and that he did not turn the moneys in, all the money which he collected, barring of course, the amount which he was authorized to spend, if you believe that he was authorized by C. P. Collins & Co., to spend a portion of what he collected for the purpose of advertising their business, but if you believe that he kept more than that, then, of course, it will be your duty to convict. * * * If you believe that he had authority to spend a certain amount then, of course, you must find that he had no authority to spend any more than that. If he spent any more than that, he was doing it upon his own authority, and without authority from the firm, and

that was spending money which he had no right to spend; and if he spent any more money than he was authorized by the firm, and failed to account to the firm for the moneys which he collected, barring the amount which he was authorized to spend, then he made such an appropriation of this money as he was not entitled to make; and, if you believe that he did that, failed to account to his firm for these moneys which he collected, then it will be your duty to convict." Under this charge, the mere retention of money, or its expenditure for the purposes of the firm in excess of the amount agreed upon for expenses, if accompanied by a bare failure to report or account for accurately, was sufficient to authorize a conviction. It leaves out the important question of criminal intent, the design to wrong, cheat, or defraud the owner, which is a necessary element of embezzlement. It may be that the facts found by the jury were sufficient to prove the existence of this intent had that question been submitted to them, but we cannot assume that they found it. The judgment must be reversed, and a new trial granted. The other justices concurred. (63 N. W. Rep., 516.)

In the matter of WILLIAM H. THACKER. Application for writ of habeas corpus. Writ quashed.

The above case is one wherein William H. Thacker was convicted of murder and sentenced to State Prison for life July 24, A. D. 1894.

For causes and reasons why said writ should not be sustained and said petitioner discharged from prison, the State contended:

1. The reasons set forth in the application of said Thacker for the writ of *habeas corpus*, show plainly that they are questions that should be raised and brought into the supreme court by writ of error and not by a writ of *habeas corpus*, therefore said writ should be dismissed and said petitioner remanded to prison.

Ellis vs. Case, 79 Mich., 322.

In the matter of Esther Caffeen, 38 Mich., 311.

In the matter of Mary Eaton, 27 Mich., 1.

In the matter of Hugh S. Peoples, 48 Mich., 627.

Additional to the above there were other reasons offered by the State why said writ of *habeas corpus* should be quashed.

The supreme court denied the writ October 26, A. D. 1894.

On June 28, 1895, a writ of error to Benzie county was granted, and case is now pending.

In the matter of the petition of JAMES MOSS for a writ of habeas corpus.

The petitioner, James Moss, was duly convicted of the crime of larceny from a dwelling in the day time, and was sentenced to the State House of Correction and Reformatory at Ionia, Michigan, for the period of five years from and including the 16th day of September, A. D. 1893.

In reply to petitioner's writ of *habeas corpus* the Attorney General submitted the following brief setting forth reasons why said writ should be denied:

ATTORNEY GENERAL'S BRIEF.

STATE OF MICHIGAN—IN THE SUPREME COURT.

In the matter of the petition of James Moss, for a writ of *habeas corpus*.

The prisoner should not be discharged for the following reasons:

First, Writ of *habeas corpus* is not the proper remedy for review of this matter. Respondent's remedy is by writ of error;

Second, The law prohibiting the sentencing of prisoner over twenty-five years of age to the House of Correction and Reformatory at Ionia, has been repealed;

Third, It does not appear in the records of the circuit court for the county of Jackson, State of Michigan, that James Moss was ever convicted and sentenced to the State Prison for felony any time prior to the 16th day of September, 1893;

Fourth, It does not appear in the record or proceedings in the case, that the sentencing judge, prior to or at the time of sentence, knew that the said James Moss had been previously sentenced to a prison for felony. And, therefore, the circumstances in this matter will not justify this honorable court in discharging the prisoner; as the reasons why he asserts that he is illegally imprisoned are that he has previously been a felon and has served time in prison.

Courts of justice should not use, as a reason for discharging a convicted felon, the fact that he has been previously guilty of crime for which he has paid the penalty. That would be a grievous injury to innocent society which it would endanger. Society should be protected rather than a guilty felon should be let free on a mere technicality, which works no hardship to the criminal; the discipline at the Ionia House of Correction and Reformatory not being as severe as at Jackson and other State prisons.

The prisoner has not been wronged in any way. He has been given a less severe sentence than the law contemplates, and it should not operate as an absolute release from punishment for the felony of which he has been found guilty.

Writ of *habeas corpus* should not perform the duty of a writ of error, and should not be allowed to where the ends of justice would be endangered by it.

Coffeen's case, 38 Mich., 311.

A prisoner having been sentenced and committed to the Reform School, being under sixteen years of age, the court sentencing him cannot, on the ground of mistake as to the prisoner's age, proceed to give a new sentence. The sentence is not made void by such mistake.

Mason case, 8 Mich., 70.

Mason case, 38 Mich., 764.

Mason case, 51 Mich., 174.

The writ will not be granted to review a final judgment in an ordinary criminal cause, for errors which are properly reviewable by writ of error and where that writ is an adequate remedy.

Eaton's case, 27 Mich., 1.
Coffeen's case, 38 Mich., 311.

Habeas corpus is not the proper remedy to review the regularity of a *prima facie* regular commitment for refusing to pay alimony; the remedy is by appeal.

Bissel's case, 40 Mich., 63.

An erroneous sentence cannot be successfully attacked upon *habeas corpus*.

American & Eng. Encyclop. of Law, vol. 9, 230, and cases cited in notes.

Habeas corpus does not lie where one is sentenced to confinement in the penitentiary at hard labor, when the offense is not punishable by confinement in the penitentiary.

Ex parte Bond, 9 S. C., 80.

Habeas corpus does not lie where one is erroneously sentenced for a misdemeanor to the county jail, instead of the penitentiary.

People vs. Cavanaugh, 2 Park Cr. R. (N. Y.), 50.

Habeas corpus will not lie where a sentence for an offense is for one year when, under the law, it could not be less than three years.

Ex parte Shaw, 7 Ohio State, 81.

Habeas corpus will not lie where the prisoner is sentenced for burglary for more than two years to hard labor for the county, when the imprisonment should be in the penitentiary, when the term exceeds two years.

Kirby vs. State, 62 Ala., 51.
Ex parte Simmons, 62 Ala., 416.

That part of section 9755 of Howell's annotated statutes which directs that "a person over twenty-five years of age shall not be sentenced to the House of Correction and Reformatory at Ionia," has been repealed by act number one hundred and eighteen of the session laws of 1893, approved May 26, 1893, and given immediate effect, that being prior to the sentencing of James Moss, which occurred on the 16th day of September, 1893. So that the objection raised as to the age of the prisoner being over twenty-five years is fully disposed of. Section twenty-nine of act number one hundred and eighteen of the session laws of eighteen hundred

and ninety-three (1893), provides "that courts of criminal jurisdiction may sentence to the House of Correction and Reformatory at Ionia, all male persons over fifteen years of age and not known to have been previously sentenced to a prison for felony," etc.

The whole matter hinges upon the question as to whether or not the circuit judge, at the time of sentence, knew that said James Moss had been previously sentenced to a prison for felony. There is nothing whatever of record in the proceedings before sentence, in the Jackson circuit court, showing that it became known to the circuit judge before sentencing James Moss, that he had previously been sentenced to a prison for felony. It is set forth in the petition for the writ, that James Moss had been previously sentenced to four years to the State Prison at Jackson, by the circuit judge for the circuit court for the county of Jackson; and the reason why petitioner claims that he is illegally restrained at the House of Correction and Reformatory at Ionia, is that he had previously been sentenced from the circuit court at Jackson, for a felony, and had served his time under that sentence in the Jackson State Prison for four years.

Daniel Griffith, deputy clerk of the county of Jackson, certifies that he has carefully examined the criminal records of the county of Jackson from the year 1842 to September 16, 1893, and that it does not appear from said records that any man by the name of James Moss was ever convicted and sentenced in said court up to the 16th day of September, 1893, when he was sentenced for larceny and is now serving his time.

In the return to writ of *certiorari* Hon. Erastus Peck, circuit judge of Jackson county, the sentencing judge in this matter, states: "I have no knowledge or recollection that it appeared when said Moss was so arraigned and plead, that he had prior thereto served a term for felony in the State Prison at Jackson, and had not been pardoned therefrom, and that anything appeared at that time upon that subject."

The only thing before this court to show that James Moss was ever convicted and sentenced for a felony to a prison previous to the 16th day of September, 1893, is the statement made in the petition for the writ of *habeas corpus*, the statement being made by himself, and is not substantiated by any record, proof or evidence of any kind; not even by the bare statement of any living person. It is not shown in any way, except by the statement of James Moss, that the sentencing judge had any knowledge whatever, at the time he sentenced him, that he had ever been previously sentenced to a prison for felony. The criminal records of the Jackson county circuit court do not show that he was ever sentenced for a felony to State Prison prior to the 16th day of September, 1893. Nothing in the proceedings of the trial before sentence shows that it was known to the sentencing judge, at the time he sentenced him to the House of Correction and Reformatory at Ionia, that he had ever previously been sentenced to a prison for a felony. The presumption is that said James Moss had never been sentenced in the Jackson circuit court for four years for felony to a State prison; that the criminal records of that court would show that fact, and the presumption would be that if it became known to the sentencing judge before or at the time of sentence, that he had been previously sentenced to State Prison for felony, it would appear in the proceedings and be a matter of record.

A writ of *habeas corpus* reaches only jurisdictional defects, and will not lie in behalf of a convicted prisoner sentenced to imprisonment in excess of the statutory period.

In re. Graham, Wis. Rep., 44 N. W., 1105.

The facts stated in the return to the writ of *habeas corpus* will be taken as true without reference to the allegations in the petition, unless issue as to these facts is raised by an appropriate pleading on the part of the petitioner.

Ex parte Durbin (Mo.) 14, S. W., 821.

Where a judgment that a prisoner be confined in the House of Correction and Reformatory shows on its face that the court found the prisoner to be under twenty-five years old, or is silent on the subject, neither the finding nor the presumption that she was under twenty-five years old (the court having no authority to commit one older than that) can be questioned on *habeas corpus*.

Ex parte Williams, Cal., 24, p. 602,

I cannot be led to think that this honorable court, on the unsubstantial statement of the self confessed felon, would release him from prison, when the records and proceedings of the circuit court utterly fail to show upon their face that the prisoner has been illegally sentenced.

FRED A. MAYNARD,
Attorney General.

The writ was denied.

CRIMINAL CASES PENDING IN THE SUPREME COURT.

The People vs. Albert E. Mason.
The People vs. Severne Knudson.
The People vs. Joseph Sweeney.
The People vs. Robert Smith.
The People vs. Frederick Brooks.
The People vs. Charles Reid *et al.*
The People vs. Major Evans.
The People vs. George A. Blakely.
The People vs. Frank Parish.
The People vs. Frank Kabat.
The People vs. Robert J. Hatton *et al.*
The People vs. George Carmody.
The People vs. Clay Johnson.
The People vs. John Weaver.
The People vs. Joseph Hanaw.

The People vs. James Dailey.
The People vs. Joseph Quinlin.
The People vs. Albert Meloche.

The following criminal cases have been submitted to the court, but not yet decided:

The People vs. Norval A. Hawkins.
The People vs. Edward C. Gay.
The People vs. James W. Smith.
The People vs. William R. Conely.
The People vs. Frank M. Deremo.
The People vs. Joseph B. Sawyer.
The People vs. Joseph Hanaw and John Kerr.
The People vs. Olie J. Watkins.
The People vs. Joseph W. Loomis.

STANLEY W. TURNER, Auditor General, Relator, v. THE BOARD OF SUPERVISORS OF BAY COUNTY, AND THE COUNTY TREASURER OF BAY COUNTY, Respondents. Mandamus. Affirmed.

The above entitled case is a famous one, and of the utmost importance to the State. Upon order the issues in said case were sent to the circuit court for the county of Ingham last spring for the trial and determination before a jury. Nearly six weeks' time was consumed in the petitioning for a *mandamus* to compel the county of Bay to pay its claim for State taxes alleged to have been collected and held back by said county, also the cost of calling out the State troops to suppress a riot in 1885. The account between the State and the county dates from December 31, 1884, when a balance was struck between the State and the county, and the State then paid the county \$95, to balance accounts.

The State's claim with interest to July 1, 1895, amounted to \$111,549.50. Suit was commenced to recover the sum by ex-Auditor General Stone, but the action failed, because it was improperly commenced against the county treasurer instead of the board of supervisors. Ex-Attorney General A. A. Ellis, at the instance of Auditor General Stanley W. Turner, nearly two years ago commenced *mandamus* proceedings against the board of supervisors jointly with County Treasurer Prybeski, to recover the money.

The said circuit court of Ingham county found in favor of the relator, and the case was submitted to the supreme court for final disposition on June 25, 1895. Upon decision of that tribunal said case will be elaborately reported in our annual report for 1896.

MOLINE PLOW CO. v. STATE TREASURER.

(Supreme Court of Michigan. April 16, 1895.)

Constitutional law—Foreign corporations—Franchise tax.

Pub. Acts 1893, No. 79, in providing that every foreign corporation which shall hereafter be permitted to transact business in this State shall pay a franchise fee, does not violate the provisions of Const. U. S. art. 1, § 8, subd. 3, relating "to the regulation of commerce among the several states." HOPKINS, J., dissenting.

Application upon the relation of the Moline Plow Company against the State Treasurer for writ of *mandamus* to compel defendant to refund money paid as a franchise fee. Writ denied.

John T. McCurdy, for relator. *Fred A. Maynard*, Attorney General, for respondent.

LONG, J. Petition is filed asking the writ of *mandamus* to compel the respondent, the State Treasurer, to pay back to relator the sum of \$400, paid by it under protest, as a franchise fee, in compliance with act No. 182, public acts 1891, as amended by act No. 79, public acts 1893. The relator is a corporation organized and existing under the laws of the state of Illinois, with its principal office at Moline, in that state. It is doing business in this State. The petition shows that about February 6, 1894, it forwarded to the Secretary of State of this State a copy of its articles of association, together with a draft for \$400, being the amount of its franchise fee, as provided by the act of 1893, and that such fee was paid under protest accompanying such draft. Demand was thereafter made for the repayment of the money. Relator claims to be doing business in this State through itinerant agents, whose duty it is to solicit orders and sell goods manufactured in Illinois. It claims that the act of 1893, above referred to, is unconstitutional, as being in conflict with subdivision 3, § 8, article 1 of the constitution of the United States which provides that "the congress shall have the power to regulate commerce with foreign nations and among the several states," etc. This contention cannot be sustained. In *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. 403, it was said: "As to a foreign corporation—and all corporations in states other than the state of its creation are deemed to be foreign corporations—it can claim a right to do business in another state to any extent, only subject to the conditions imposed by its laws. As said in *Paul v. Virginia*, 8 Wall., 168, the recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy." The rule was stated by this court in *Insurance Co. v. Davis*, 29 Mich., 238, that "a foreign corporation is not a citizen of a state creating it except in a qualified sense; and it can do no business in any other state except on such conditions as the latter sees fit to impose." See, also, *State Treasurer v. Auditor General*, 46 Mich., 224, 9 N. W., 258. The strictly legal existence, by force of obligatory law of a corporation, is confined to the state

which created it and endowed it with its powers, capacities, and rights, which it can only exercise in another state by the permission, express or implied, of the legislative power thereof. *Thompson v. Waters*, 25 Mich., 214; *Insurance Co. v. Raymond*, 70 Mich., 507, 38 N. W., 474.

The statute (act No. 79, public acts 1893) provides, among other things, that every corporation organized under the laws of this State and every foreign corporation which shall hereafter be permitted to transact business in this State shall pay a franchise fee of one-half of one mill upon each dollar of its authorized capital stock, etc. It is claimed, however, that this act was held unconstitutional in the case of *Coit & Co. v. Sutton* (Mich.), 60 N. W., 690. The validity of the act was not questioned in that case. It was held not to apply to the facts there stated. The party there was simply selling goods within this State manufactured by a foreign corporation. The corporation was not asking to have its articles of incorporation filed within this State. It was said that the act in question did not apply to foreign corporations whose business within this State consisted merely of selling through itinerant agents, and delivering commodities manufactured outside this State. Here the relator not only sells its products through itinerant agents, but it comes within the State, asking to have its articles of association filed here, and that it may be put on the same footing with our own home corporations. The act gives the foreign corporation the same privileges as domestic ones, but provides that it must comply with the act by paying the franchise fee which a domestic corporation must pay. The relator has had its articles of association filed here, has paid the franchise fee provided by the act, and is not entitled to have its moneys repaid. The writ must be denied.

The other justices concurred. (Vol. 62 N. W. Rep., 1119.)

RICH, Governor, v. CHAMBERLAIN, Warden.

(Supreme Court of Michigan. March 19, 1895.)

Sentence of imprisonment—Effect—Transfer to different prison—Board of pardons—Constitutionality of law.

1. A sentence of confinement in a certain prison is subject to conditions imposed by law, at the time of the sentence, for the transfer of prisoners from one prison to another.
2. The fact that the law providing for the transfer of prisoners from one prison to another does not expressly provide for the transfer of his personal effects, and for ascertaining whether he is entitled to good time, does not render it invalid.
3. Pub. Acts 1893, No. 150, § 6, providing for a board of pardons, whose duty it shall be to investigate petitions for pardons, and to report to the Governor the result of their investigation, with such recommendations as they shall deem fit, and that the Governor, on receipt of such report, may, as he shall deem fit, grant or refuse the pardon, does not violate Const. art. 5, § 11, vesting the pardoning power exclusively in the Governor, subject to regulations by the legislature in regard to the manner of making applications for pardons. McGRATH, C. J., and HOOKER, J., dissenting.

Application, upon the relation of John T. Rich, Governor, against William Chamberlain, warden of State Prison, for a writ of *mandamus* to

compel defendant to transfer a convict from the State Prison to the House of Correction, in pursuance of the order of relator. Writ allowed.

Fred A. Maynard, Attorney General, for relator. *Thomas A. Wilson*, for respondent.

HOOKEE, J. Act 118, of the public acts of 1893, is an act entitled "An act to revise and consolidate the laws relative to the three prisons known as the State Prison at Jackson, the Branch of the State Prison at Marquette, and the House of Correction at Ionia." A board of control was provided for each, consisting of three members, to be appointed by the Governor, by and with the advice and consent of the senate, of which board the Governor is *ex officio* a member. These boards were authorized to make general rules for the government of their respective prisons. Section 28 of this law authorizes the Governor to order the transfer of prisoners from one to another of these prisons, upon the recommendation of the State board of pardons. Upon such recommendation, the Governor issued his order and warrant, as provided in the law under discussion, for the transfer and removal of one William K. Stevenson, a convict, from the State Prison to the House of Correction. The warden of the State Prison refused compliance, and these proceedings were instituted by the Governor to compel it.

The warden returns that his refusal was in pursuance of a resolution adopted by the board of control of the prison directing him not to obey the command of the Governor, for reasons therein set forth. A copy of this resolution, signed by two of the appointed members, is attached to the answer of the warden. The authority for transferring prisoners is found in section 28, act 118, laws 1893.

It is contended that the transfer is a judicial act, and can only be performed by an officer clothed with judicial powers; that the determination of the circuit judge as to the prison in which the convict should be confined is a judicial determination; and that the prisoner has a right to remain in such prison for the period of his imprisonment; or, at all events, that he cannot be summarily removed without a hearing. It is said that the law discriminates between the prisons; that certain offenders cannot be sentenced to the State Prison; and that the worst criminals cannot be sentenced to the House of Correction, which is said to be designed for the less hardened class of criminals. The legislature has full authority to provide prisons, and to determine where prisoners may be sent; and the courts have no discretion as to the place to which criminals may be sentenced except as the legislature gives it. Such discretion is lodged with the circuit judges and they act judicially in its exercise. But this doctrine is a qualified one, or rather the order of the judge is qualified by the law and such rules and regulations of the prisons as may have been lawfully adopted. Every sentence is subject to these, although it does not mention them. The law requires every person convicted of murder in the first degree to be sentenced to solitary confinement and hard labor for life. Yet, under the law and prison rules, such prisoners are taken from their solitary confinement after a short time, and are allowed to work with other convicts.

Again, all sentences direct that the prisoners be confined in the State Prison; but, under the law, they may be hired to do work outside of the walls, in factories or mines or upon the highways, different states having

different rules. The sentence is always imposed and received under and interpreted by the law to which it is subject. The judge and the prisoner act with the knowledge of this fact, and must be presumed to understand that, while the judge may or may not sentence a prisoner to one or another institution, there is an existing law under which he may be lawfully transferred. The sentence impliedly subjects him to this when, in the discretion of the proper executive officer or board, crowded prisons or any other reasons require or make it advisable. We need not determine whether this would be applicable to cases of sentence before the law providing for transfer took effect. The judicial act is fully performed by the sentence, which, though in form absolute, involves conditions imposed by law by which the prisoner's rights are limited and to which they are subject; and while the court may not, in terms, sentence certain classes of offenders to one or the other of the prisons, the sentence construed by the law is to the designated prison, but subject to transfer in accordance to law.

It was urged at the hearing that section 28 was defective, and did not make the necessary provision to protect the rights of convicts; that there is no requirement to transfer his personal effects from one prison to the other; and that no method is provided by which it can be determined whether or not he was entitled to what is called "good time" at the time of the transfer. Doubtless, these are the subjects of rules made by the boards of control, but, if not, the former is of little importance, while, as to the latter, the prisoner might be amply protected by a presumption of good behavior, unless the contrary should appear. The action of the governor, under this statute, must be based upon a recommendation of the Advisory Board of Pardons, and if such board has no legal existence, its recommendation would be of no validity, and could not be a substantial basis of action by the Governor. This board was established in 1889, and a new act was passed in 1893, under which the present board exists. The board consists of four members, appointed by the Governor, by and with the advice and consent of the senate. The board may appoint a clerk, may hold sessions when and where occasion may require, send for persons and papers, and administer oaths. Its duties are to investigate the cases of convicts confined in the various prisons, who may petition for pardons or for license to go at large, and to report to the Governor the results of investigations, with such recommendations as, in the judgment of its members, shall seem expedient, either in respect to pardons or commutations, or refusal of pardon or commutation. The act provides, further, "that upon receiving the result of any such examination, together with the recommendations aforesaid, the Governor may, at his discretion, upon such conditions with such restrictions, and under such limitations as he may deem proper, grant the desired pardon, or commutation." Const. art. 5, § 11, provides that "he [the Governor] may grant reprieves, commutations and pardons, after convictions, for all offenses except treason, and cases of impeachment, upon such conditions, and with such restrictions and limitations as he may think proper, subject to regulations provided by law relative to the manner of applying for pardons. He shall communicate to the legislature at each session, information of each case of reprieve, commutation or pardon granted, and the reasons therefor." This section of the constitution, in express terms, lodges the pardoning power with the Governor, and with it the coordinate branches of government have nothing to do, except as the legislature may by law provide

how applications may be made, and is entitled to a report of action taken. *People v. Brown*, 54 Mich. 28, 19 N. W., 571; *People v. Moore*, 62 Mich., 498, 29 N. W., 80; *People v. Cummings*, 88 Mich., 251, 50 N. W., 310; *U. S. v. Wilson*, 7 Pet., 150; *Ex parte Wells*, 18 How., 307; *Ex parte Garland*, 4 Wall., 333. The power conferred by this section of the constitution is practically unrestricted, and the exercise of executive clemency is a matter of discretion, subject, perhaps, to the remedy by impeachment in case of flagrant abuse. It cannot, however, be treated as a privilege. It is as much an official duty as any other act. It is lodged in the Governor, not for the benefit of the convict only, but for the welfare of the people, who may properly insist upon the performance of that duty by him, if a pardon is to be granted. "A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended." Opinion of Chief Justice Marshall in *U. S. v. Wilson*, 7 Pet., 160. Lord Coke defines "pardon" as "a work of mercy, whereby the king, either before or after conviction, forgiveth any offense," etc. 3 Inst., 233. See, also, 1 Bish. Cr. Law, § 898.

There are many reasons why a power of this kind should be confided to the highest executive officer. It involves a wide discretion. The proceedings upon the trial may be reviewed. New evidence may be taken upon which to rest the pardon, thus, in effect, granting a new trial. It may be *ex parte*, after the witnesses have disappeared or are dead. It may and often is based upon an alleged reform of an offender. Youth or age may furnish an excuse for its exercise. Petitions which a good-natured public sign without reading, and importunities of interested persons and friends, may be expected wherever there is hope of success. It is therefore of the highest importance to the public that this power should be carefully exercised, and that the fullest responsibility should rest upon the person to whom it is confided. The office of Governor seems to be generally considered the proper one with which to lodge such responsibility, and the public have the right to insist upon his performance of the duty. Not only is it beyond the power of the legislature to impose the duty upon others, but it should not in any way lessen his responsibility to the public, when he sets aside the judgment of court and jury by opening the doors of a prison to a convicted felon. If the act in question does this, it should not be sustained. The effect of it is to establish a sort of tribunal open to convicts, where the question of whether they should be pardoned or be licensed to go at large may be tried. The conclusion reached, *i. e.*, the result, accompanied by a recommendation, must be certified to the Governor, who then grants or refuses a pardon, as he may think advisable.

We understand that the practice of this board is to conduct its investigations with care and thoroughness, to require notice to be given to the authorities, to reduce proof to writing, and to return the same, with a report in detail, to the Governor. This, however, seems to be under rules of its own devising, or prescribed by the Governor, for the act requires nothing of the kind. This is unimportant, however, as it might be remedied by legislation. But the vital defect in the act is that it tends to substitute the judgment of the board for that of the Governor. It can be truly said that the opinions of the board need not be controlling. But

the tendency is naturally to offer an opportunity, if not an inducement, to an overburdened magistrate, to depend upon the judgment of a board in which he has confidence, and which has made a more careful investigation than he has made, and to act upon the recommendation of such board, while the public have a right to the fullest exercise of his own understanding and judgment, which they have signified by their constitution that they desire. This right should not be thwarted or placed in jeopardy by a law whose natural result may be expected to contravene the spirit of the constitutional provision. A loose exercise of the pardoning power is greatly to be deplored. It is inexcusable. It is a blow at good order, and is an additional hardship upon society, in its conflict with crime and criminals, a conflict which is irrepressible, and in which the criminal has many, and possibly undue, advantages. The erection of a court of pardons is of such doubtful expediency, offering, as it does, an opportunity to the convict, practically within the doors of every prison, to press his suit for pardon, that it should never be permitted until the people have signified a willingness that the safeguards placed in their constitution be removed. The erection of a court of pardons is to invite unworthy applications. A practice grows up. It offers a premium to pardon brokers, and the pardon, in place of remaining a matter of high executive discretion, based upon legitimate clemency, degenerates to a routine award of a committee, to be obtained and justified by compliance with fixed rules, and sought as an assertion of right rather than clemency. This section contemplates that the legislature may regulate the manner of applying for pardons, but this should not be construed to confer the power to limit the discretion of the Governor to grant pardons or to require any other officer to first pass upon the question. All power is taken from the legislature except that of regulating the manner of applying to the executive. Act 150 does not profess or attempt to do this. Its title is silent upon the one and only subject in relation to pardons which the constitution permits the legislature to act upon. It nowhere provides how applications for pardons shall be applied for, or that such applications shall be uniform. It does not regulate applications for pardons. It provides for a board, which must act in cases where petitions are filed, and gives no authority to the board to act in the absence of petitions. It seems to regulate the board which the act creates, instead of regulating the manner of making application to the only officer authorized to grant pardons. Under the claim that it is prescribing a manner of applying for a pardon, it imposes a duty to investigate and report, and professes to authorize the Governor to act upon such report and recommendation. If this means anything, it is that the Governor might lawfully forego any investigation, and act upon the recommendation of the board, substituting their judgment for his own. The answer to this is that we cannot suppose that the Governor will pay any attention to the recommendation, because the constitution imposes a duty upon him. The act does not regulate the method of applying for pardons. It does provide for a sort of investigation, which we are told that the legislature intended should be disregarded. In my opinion, this was not the legislative intent. On the contrary, it was expected that the Governor would do just what the legislature undertook to provide that he might do, viz., act upon the report and recommendation without personal investigation. If there were no board of pardons, a governor would not be likely to feel at liberty to grant a pardon upon a mere application, without investigation. If he

did, such a practice would not meet public approval, nor would it be a proper discharge of his duty. Yet the act in question provides that he may do that very thing, and, to sustain the act, the argument must be made that the legislature did not mean what the language expressly states, but intended that the report and recommendation should be wholly disregarded by the Governor.

Our attention has not been called to a case involving the question that has been discussed. Our own investigation has disclosed that, by most state constitutions, the pardoning power is lodged with the governor, as it is with the president under the federal constitution. In several states the power of the governor is restricted, possibly to cut off any danger of an undue exercise of the power. In most of these, however, the consent of the governor is indispensable. It is, however, a significant fact, and one that bears forcibly upon this case, that we have found no instance where a board has been created by statute, but invariably by constitutional provisions. In Florida, pardons may be granted by the governor, justices of the supreme court, or a major part of them, provided that the governor be one. Const. Fla., art. 6, § 12. In Louisiana, the governor may act by and with the consent of the senate. Const. La., 1868, title 3. In Maine, after conviction, the governor may pardon, with the advice of a council of seven members chosen by the general assembly. Const. Me., art. 5, § 11. In Massachusetts, the governor and a council of nine chosen by the legislature may grant pardons. Const. Mass., c. 2, § 1, art. 8. In Nevada, the governor, justices of the supreme court, and the attorney general constitute the board. The governor must concur. Const. Nev., 1864, art. 5, § 14. In New Hampshire, the governor acts, with the advice of a council of five elected by the people. Const. N. H., art. 51. In New Jersey, the governor, chancellor, and six judges of the court of error constitute the board. The governor must act. Const. N. J., art. 5, § 10. In Pennsylvania, the governor, lieutenant governor, secretary of state, attorney general, and secretary of interior affairs constitute the board. Any three may act. Const. Pa., 1873, art. 4, § 9. In Vermont, the governor and a council consisting of lieutenant governor and twelve councilmen, to be elected by the people, exercise the pardoning power. Const. Vt., 1793. Michigan appears to be the only state that has attempted to regulate the matter of pardons by statute. As we have already said, the subject is expressly removed from legislative interference, and we think that the law of 1893, providing for the Advisory Board, is clearly unconstitutional. Being so, said board could not lawfully make the recommendation which is a condition precedent to an order to transfer a prisoner. We think that the writ should be denied.

MCGRATH, C. J., concurred with HOOKER, J.

GRANT, J. We concur in the opinion of Brother HOOKER, except that portion wherein he holds the law providing for the board of pardons to be unconstitutional. We also agree with him in saying that "the pardoning power should be carefully exercised, and that the fullest responsibility should rest upon the person to whom it is confided." That power is vested exclusively in the Governor of the State, and any law which restricted this power would be unconstitutional and void. While, however, the constitution unqualifiedly vests this power in the Governor, it, at the same time and with equal clearness, vests in the legislature the

power to provide, by law, regulations relative to the manner of applying for pardons. Article 5, § 11. Under this power, it would clearly be competent for the legislature to provide as regulations that the petition or application should be under oath; that it should be first submitted to the judge and prosecuting attorney, for them to indorse thereon or attach thereto such statements as they might deem proper to make touching the merits of the application, and designed to furnish the Governor information upon which to base his action; that the testimony taken upon the trial, if it exists, should accompany the petition; and that testimony under oath should be taken at the prison or elsewhere bearing upon the reasons urged in the petition for pardon. Is there any doubt of the right of the Governor under this constitutional provision, without any act of the legislature, to ask the opinion or advice of any of these officers, or to ask either to examine the facts, the conduct of the prisoner, or any other material facts upon which conviction was based, and report to him, without any abandonment of his constitutional duty? How else can he obtain the necessary facts upon which to base intelligent action? In the absence of any law providing regulations, the Governor possesses the undoubted right to require, as a condition precedent to the consideration of application, that it shall be accompanied by these statements. Certainly, a law which imposes no other regulations than those which he himself might impose is not unconstitutional.

The law in question does nothing more than to prescribe the regulations for obtaining the information which must be conceded to be necessary for an intelligent and proper exercise of the pardoning power. No governor ought to pardon without having before him the facts upon which the conviction was based, as well as the conduct of the prisoner after conviction. This law does nothing more than to prescribe the methods and regulations for obtaining this information which is so necessary for an intelligent and proper exercise of the pardoning power. The section of the act upon which is based the alleged unconstitutionality reads as follows: "It shall be the duty of said board to investigate the cases of such convicts now or hereafter confined in the State prisons and house or houses of correction as may petition for pardon, or for a license to be at large, and to report to the governor the results of their investigations, with such recommendations as shall in their judgment seem expedient either in respect to pardons, or commutations, or refusal of pardon or commutation. Upon receiving the result of any such examination, together with the recommendations aforesaid, the Governor may at his discretion upon such conditions, with such restrictions and under such limitations as he may deem proper, grant the desired pardon or commutation, which warrant shall be obeyed and executed instead of the sentence originally awarded." Pub. acts 1893, act No. 150, § 6. It was not the purpose or intention of this act to infringe upon the constitutional prerogatives or power of the Governor. The name given to the board in section 1, viz. "The Advisory Board in the Matter of Pardons," clearly indicates this. In practice, as shown in Brother HOOKER's opinion, the board assumes none of the power of the Governor to pardon, but recognizes its sole duty to be to gather information; and for this purpose it conducts its investigation with care and thoroughness, requiring notice to the authorities and proofs to be taken and returned to him for his examination. The fact that such board is authorized to make recommendation is no infringement upon executive power. It might as well

be held that the report and recommendation of the circuit court commissioner, to whom a case in equity has been referred, were an infringement upon the power of the court, upon which the constitution and the law have conferred exclusive jurisdiction. It has been a common practice heretofore for the trial judge, the prosecuting attorney, and the jury who tried the prisoner to recommend to the Governor that he be or be not pardoned. It might as well be held that such recommendations were an unconstitutional interference with his power as to hold that the recommendations of this board were unconstitutional. The recommendations in the one case are of no greater significance than in the other. In neither case have they any binding force upon him, and the law neither provides nor intends that they shall have. We hold the law to be constitutional, and the power to transfer convicts from one prison to another valid. The writ must issue.

LONG and MONTGOMERY, JJ., concurred with GRANT, J.

SCHEDULE B.

Schedule B contains a list of *mandamus* cases, *certiorari* and other proceedings commenced by the Attorney General in behalf of the State, or commenced by other parties, in which the State was directly interested.

GEORGE L. WALKER vs. THERON F. GIDDINGS, Commissioner of Insurance.
Mandamus. Writ denied.

This is a case wherein George L. Walker, relator, on behalf of the American Monitor, a fraternal beneficiary organization, applied to the supreme court for a writ of *mandamus* to compel the respondent, Theron F. Giddings, Commissioner of Insurance, to receive and file the reports of said American Monitor, according to the provisions of act 119 of the public acts of 1893, and to issue his certificate of authority to said association to carry on and transact the business specified in several sections of the articles of association, constitution and by-laws of said association.

On the 9th day of August, 1893, the American Monitor was incorporated under the provisions of act 104 of the laws of 1869, the same being chapter 118 of Howell's annotated statutes, and on that day filed its articles of association with the Secretary of State. Subsequently act 119 of the laws of 1893 took effect and in accordance with section 3 of said act, which provides that existing corporations coming within the description of fraternal beneficiary societies, organized under any law of this State, and doing business in this State at the time said act took effect, should be considered duly organized and might continue "such business," a report of said association was attempted to be filed in the office of the Commissioner of Insurance, which report he refused to accept. Application was also made, under section 7 of said act 119 for a permit authorizing said association to do business in this State. This request was also refused. The Commissioner gave the following reasons for his actions:

First, That by the articles of association, constitution and by-laws of the American Monitor, it is proposed to carry on what is commonly known as endowment insurance, or the paying of a specified sum upon the arrival of a certain stated time;

Second, That the law under which said association was incorporated has been repealed, save as to the corporations existing at the time act 119 took effect, and as said association has never reincorporated under act 119, but merely continues its business by virtue of the provisions of section 3, of said act 119, it has no authority to do any other business than that specified in act 104 of the laws of 1869.

Writ of *mandamus* was denied by supreme court December 22, 1894.

**ALBERT M. TODD, Relator, vs. THE BOARD OF ELECTION COMMISSIONERS
OF KALAMAZOO COUNTY Et AL., Respondents.**

(State of Michigan—Supreme Court.)

RESPONDENT'S BRIEF.

The legislature of this State at its present session passed an act as follows:

"An act to amend section ten of act number one hundred and ninety of the public acts of eighteen hundred and ninety-one, entitled 'An act to prescribe the manner of conducting, and to prevent fraud and deceptions at elections in this State,'" approved July third, eighteen hundred and ninety-one.

SECTION 1. *The People of the State of Michigan enact,* That section ten of act number one hundred and ninety of the public acts of eighteen hundred and ninety-one, entitled "An act to prescribe the manner of conducting and to prevent fraud and deceptions at elections in this State," approved July third, eighteen hundred and ninety-one, be and is hereby amended so as to read as follows:

SEC. 10. The said board of election commissioners shall cause to be printed on the ballot the names of the candidates nominated by the regularly called conventions of any party, and it shall be the duty of the State, district, or county committee of each political party to forward to the chairman of the said board of election commissioners of each county in the State, not less than twenty days prior to any such election, a copy of the vignette adopted by them and the names of all candidates nominated at any regularly called convention at which candidates for any of the offices mentioned in section one of this act shall be nominated, and no other names, unless authorized or instructed by said convention. All the names of parties so nominated shall be certified to by the chairman and secretary of the respective committees: *Provided,* That it shall be unlawful for said board of election commissioners to cause to be printed in more than one column on the ballot the name of any candidate who shall have received the nomination by two or more parties or political organizations for the same office. Any person so receiving the nomination for the same office by two or more parties or political organizations shall, within five days after his name has been certified to said election commission as having been nominated by two or more political parties for the same office, give notice to the board of election commissioners of each county in the State, if said nomination be for a State office, and to the board of election commissioners of each county in the district if said nomination be for a congressional, judicial or legislative office, and to the board of election commissioners of the county, if such nomination be for a county office, specifying in such notice the column of which party or political organization on the ballot he wishes his name to be printed, and said board of election commissioners shall print the name of such candidate in such column on the ballot so specified by him, and in no other column. Such notice shall be given to said election commissioners by delivering the same either in person or by depositing the same in the postoffice, in a sealed envelope, with postage prepaid, directed to the chairman of such board of election commissioners at the county seats of

the respective counties: *Provided further*, That in case any such candidate so nominated by two or more parties or political organizations for the same office, and whose names shall have been certified by the chairman and secretary of the committees of such parties or political organizations to said board of election commissioners within the time as above provided, shall refuse or neglect to give notice to said board of election commissioners, as above provided, and within the time above named, specifying in which column on the ballot he wishes his name to be printed, then and in such case said board of election commissioners shall cause his name to be printed in the column of the party or political organization, from the chairman and secretary of whose committee said board of election commissioners shall have first received notice of such person's nomination for said office, and said board of election commissioners shall not cause the name of such person to be printed on the ballot as a candidate for the same office in any other column."

This act, by the requisite vote, was given immediate effect; it received the approval of the Governor on the fourteenth day of March, A. D. 1895, and is now the law of this State.

A vacancy exists in the office of member of congress from the third congressional district of Michigan, and an election to fill said vacancy has been called for the first day of April next.

The relator, Albert M. Todd, in this case, has received the nomination from the prohibition party, the people's party and the free silver party. The petitioner desires to have his name appear three times upon the official ballot as the candidate of said three parties. The respondents have refused to comply with the request of petitioner, because of the law above set forth. The petitioner says that said act is unconstitutional and void, and is repugnant to the act of which it is an amendment; is defective and unworkable in its machinery and its provisions are invalid for these and other reasons. The respondents, on the other hand, claim that the act is constitutional and valid; and this issue of law is now presented to this court for decision.

ARGUMENT.

This case involving the constitutionality of the law cited, is a most important one and should receive the most careful attention.

The proposition upon which I base my argument is this, that the act in question is not only constitutional and therefore legal, but that it is one of the wisest laws that could be placed upon the statute books, a law which must do much to prevent fraud at elections in this State, and to preserve the sacredness of the ballot box, upon which the welfare of this country depends.

My second proposition is this, that the method which has prevailed in this State, of placing the name of a man in two or more columns on the official ballot, is now illegal, and if not unconstitutional, should be so; that it is designed to accomplish by fraud and deception what could not be accomplished by legitimate methods. I announce these propositions not from my *a priori* conceptions, but after having given the subject the most careful investigation possible in the time allotted for the preparation of this argument. My purpose now is to demonstrate the truth of the propositions which I have annunciated.

In the first place I desire to treat this subject from an historical standpoint. We have now in this State what is known as the Australian ballot system. This is one of the greatest reforms of this century. For years in this country corruption, fraud and intimidation, to name none of the less palpable evils that beset elections, have existed. All good citizens deplored these evils, but confessed that they were powerless to arrest them. It was reserved for strippling states in the far east, when to them, in their turn the evils came, not merely to apply but to invent an effective remedy for the grosser evils that prevent an election from being what it should be, the free and accurate expression of the electors. This great remedy had its birth in Australia, from thence it came to the mother country, thence westward to Canada and eastward again to continental countries, and finally westward again to these United States.

"The secret ballot was first proposed by Francis S. Dutton, member of the legislature of South Australia, from 1851 to 1865, and during that time twice at the head of the government, in the session of legislative council of 1851, before representative government and universal suffrage had been granted to South Australia. At that time the usual attendant vices of open elections already flourished in the colony. Riot and violence, bribery and intimidation and coercion were common; and after meeting with the strongest opposition, which this reform has always met with, became a law under the name of elections act 1857-8, No. 12, and typifies the system which has since spread to two other continents. From the moment the reform was introduced the aspect of elections was completely changed; rioting and disorder disappeared entirely, the day of polling saw such quietness that the stranger could not realize that an election was going on; intimidation by landlords and dictation by trades unions alike ceased; canvassing was practically given up, and the prevailing custom of exercising coercion or improper influence absolutely died out of the country. In Victoria, an almost simultaneous movement took place in favor of the secret ballot, and the new system spread rapidly in the land of its birth. It was adopted in Tasmania February 25, 1858, and in the same year New South Wales entered the ranks and applied the new system to its parliamentary elections. Good results of the Australian system of voting at last reached England, where thoughtful men were anxiously looking for the solution of the problem of pure and tranquil elections. Before the adoption of the Australian system in England, violence, corruption, fraud and intimidation in all its phases and varieties were frequent; always increasing, especially in the larger cities, resulting finally in a condition of affairs which was described by high authority as frightful. But by the ballot act of 1872, brought in February 20, 1870, by William E. Forster, Secretary Bruce and Lord Hartington, all this was changed and all of the evils attending elections were at once destroyed. The new method next appeared in British America, then in Ontario and Quebec, then back to Belgium and other foreign countries." Here this great reform based on the Australian or English system first seems to have been advocated by a member of the Philadelphia civil service reform association in 1882, in a pamphlet entitled English Elections, and by Mr. Henry George in the North American Review for March, 1883. But the first direct efforts at legislation made in this country was in our own State of Michigan. In January, 1885, a bill embodying the Australian ballot system was introduced in the lower house of the legislature by Mr. George W. Walthew, but did not receive enough votes to become a law

In 1887, Mr. Walthew's bill was remodeled and again offered by Mr. Judson Grinnell of Detroit. It passed the house by a vote of fifty-seven to thirty-two, but in the senate seventeen votes were necessary for its passage and the bill received only fourteen upon its first vote. After amendment it received nineteen votes, but this occurred on the last day of the session and too late for the appointment of a conference committee. In the session of 1889, three bills were introduced in our legislature, and finally act number two hundred and sixty-three of the public acts of 1889, became the law of this State, viz.: "An act to prescribe the manner of conducting, and to prevent fraud and deception at general elections in this State."

I desire to impress this fact upon the court that during the years that this measure had been pending in the legislature, it received a great deal of opposition, and the act which was finally passed was a compromise measure, and "not at all satisfactory." But still it was a great reform measure, and one which has saved this State from many abuses. From our State the reform movement spread rapidly to many of the other states of our union, and soon the entire electoral machinery of this country will be reformed in accordance with the principles of the Australian method. That system has now received the approval of the legislature of a large majority of the states of our union. It is not the method of any one country or people, but finds its home wherever pure and sincere expression of conviction is the constitutional mode of the makers and the administrators of the laws.

ESSENTIALS OF THE AUSTRALIAN SYSTEM.

Amid the minor variations of details in the numerous statutes the cardinal features of the system as everywhere adopted are:

First, The absolute secrecy of the ballot;

Second, An official ballot containing the names of all candidates printed and distributed under State and municipal authority;

Third, And in all of the states where the true Australian system prevails, provision for independent nominations, by which independent nominees may be made by means of petitions or nomination papers. In this way citizens who are dissatisfied with all the regular nominations for a given office, can, by uniting in favor of a suitable candidate, have his name printed on all the official ballots and have it distributed at the polls on equal terms with the names of the regular party candidates. This, wherever the practice prevails, is found to be the most deadly blow that could be made at the caucus or primary system, and is certain to lead to the destruction of that system's worst evils, if not to be the abandonment of the system itself. By the operation of this ballot system, with the last element included, all men are given political equality before the law actually as well as theoretically; by it we secure not only free elections but free nominations as well; not merely a sincere and accurate expression of opinion, but an opportunity to nominate and to vote effectively for any one whom we desire. Until this last element is introduced in this State, nominations open to all and a place in the ballot free to all nominees which as I say, is an integral and invaluable part of the Australian system, we shall not have a genuine ballot reform. By the nominating method any body of citizens of the number prescribed by law, can have the name of their candidate printed on the same ballot with the

names of all other candidates, for the same office. So that before the law and before the voters all candidates and all party organizations stand on a perfectly even footing.

In many of the states where two or more persons nominate a man and he accepts the nomination in writing, the name of such person can appear upon the official ballot, for the reason that while his candidacy may be hopeless as regards the election of the nominee, yet it may be important and highly desirable as a means of exhibiting the strength of a section of electors, or of a particular movement and thus compelling the attention of the leading parties, and result in the modification of their platforms and legislative policies. An acceptance of the nomination is required for many reasons, but most important because it places on record the deliberate decision of the nominee to appear as a candidate and prevents his withdrawal for improper reasons and because of deals and other political tricks, now only too common, and for the preventing of which in part, at least, the act under consideration was adopted.

Fourth, I next desire to call the attention of the court to the arrangement of the contents of the ballot. There are two principal methods that have been adopted. One adopted in New York and elsewhere where the names are arranged in groups representing the nominations of one party for all offices; or as in the nearer Australian method, which has been adopted in Massachusetts, Kentucky and other states, where the names are arranged in groups representing the nominations for the same office, the order of the names being alphabetical. The principal consideration in favor of the former mode, which is the mode prevailing in this State is, that where a reading and writing qualification does not exist it greatly helps the illiterate voters, for this plan allows a vote to be given for all the candidates of one party, by making a single cross at the head of the list, and as the illiterate will know beforehand the position of his party list, he has only to make his cross there and the matter is ended. But the principal objection to this method is, that it tends to foster a sheep-like and unintelligent manner of voting. The voter not stopping to consider the individual merits or demerits of the respective candidates, but voting his party ticket straight without thought or consideration.

The great principles of the Australian system are these: Perfect equality upon the ballot paper for all candidates, and that each individual elector should carefully examine the ballot and conscientiously determine who of the many candidates for the given office, in his judgment, is best fitted for the place, because, as Mr. Brice in his great work on the American Commonwealth, volume 2, page 385, says: "To find the honest men and having found them to put them in office and keep them there, is the great problem of American politics." And one of the greatest reasons why they cannot be put there is because of the extra legal machinery which has been employed in the past, by which unfit men were elected to office, and carried in on the strength of the ticket rather than on their individual strength.

I have made this historical reference to this great reform for the purpose of enabling us all to clearly understand just what it is; the evils that existed before its introduction, and how by the application of ballot reform principles these evils have been overcome. In my judgment this discussion will come to an end at once when this reform measure is fully understood; because everybody, the moment they understand the subject will see clearly that the method which has prevailed in this State of plac-

ing a man's name on the ballot two or more times, is one of the most pernicious customs that could prevail, and in a large measure nullifies and destroys the reform measure itself. This custom strikes a deadly blow at the system. It is opposed to its principles, it is inimicable to good government and the legislature acted wisely in putting an end to it.

I shall now undertake to prove the proposition I have just stated. The relator comes here through his legal representatives and makes the claim to this court that this wise and wholesome legislation should be declared null and void by reason of its unconstitutionality. When I know of the many efforts that are made to get this court to declare an act, which has been passed by the legislature, unconstitutional, I agree with the words, "That in these days no cause is so poor that it is ashamed to lay profane hands upon the constitution and to seek protection in strained and unintended constructions of its clauses; that when all other refuge fails, the desperate cause flies to the ark of the constitution. That this right of sanctuary has been abused, and that there is a point beyond which one cannot, without loss of self respect, uphold a worthless argument, and that an attack in the name of the constitution on a statute intrinsically just and efficacious, can not be defended."

The interests which thrive upon machine politics have done all in their power in the past years to kill this reform, but they have been repulsed all along the line, and as a dernier resort they have endeavored to break it down by striving to get the courts to declare the legislation unconstitutional. The most superficial, flimsy and insincere arguments have been offered against the validity of these statutes. It is now claimed that the law is unconstitutional, because it forbids the name of a candidate appearing on the official ballot more than once. My first answer to this objection is this, that in no country or in no state where the true Australian ballot system prevails would it be thought of for a moment to place the name of a candidate on the ticket more than once, because everyone would know, that understood the matter, that this would be a long stride in the direction of destroying the system itself.

The examination of the reform which I have made shows this and enables us to see what a deadly blow the practice which prevailed in this state and for which the relator is now contending, has made at this reform movement. In no place on earth is this allowed where the reform movement prevails. The fundamental principle of this movement is this, that every eligible person has the right to be voted for by any elector who desires to do so; and secondly, the right of each elector to exercise choice among those who are eligible. The feasibility of independent, political movements depends upon the recognition and preservation of these two principles. But these rights, like the privilege of suffrage, depend for their effectual exercise upon an appointment of time, place and manner, and it rests with the legislature to make regulations for protecting these rights and insuring their enjoyment.

Under the old system the right to be voted for was grossly impaired, was not in fact, enjoyed at all by those who could not receive the support of the caucus or convention. The Australian ballot system abolished these abuses and restored the right in its integrity. Under the Australian system any man may be a candidate for office who receives to his nomination paper a few signatures, and in many cases provision is made for blank spaces on the ballot under each office to insert names of those that are not nominated at all. But, if your honors please, the right to be voted for,

which an American citizen enjoys, is a right to have an equal opportunity to be voted for. "The equal right to elect and be elected," are the express words in the Massachusetts declaration of rights, and the same words are found in many of the constitutions of the states of the union. But whether the words are found or not, it is none the less by common law a part of the conception of the electoral right. Now by reason of legislative neglect and in defiance of these constitutional principles the evil has grown up in this State, which is now under consideration, and which I trust is ended forever by the law just enacted.

If a man has a right to be voted for, and also an opportunity to be voted for, it must follow that every nominee shall have an equal chance upon the ballot, so far as its official arrangement is concerned. No candidate shall have an advantage over another, but each candidate must stand on a perfectly equal footing with the other. Now, I ask, how can this constitutional principle be carried out when it is permitted that one man shall have his name printed on two or more columns of the official ballot. In other words, that he shall have his name appear three times while his opponent has his name but once. Does it not absolutely follow as surely as the night follows the day, that this does give an advantage to the man whose name is printed two or more times, and that his name is printed two or more times on the ballot for the express purpose and with the deliberate design of securing an unfair advantage over his opponent? There is no man that will deny that it is for this very purpose that these fusions and combinations are made. This vicious custom has been allowed to grow up in this State, because, as I say, the Australian system in its purity could not be introduced here at once. The measure was a compromise one; and therefore, because it was not prohibited by legislation, this custom grew up. Why, if your honors please, look at this matter for a moment: This is a free government, controlled by political parties who are supposed to have political principles, and who are supposed to name as their candidates men who believe in those principles. Now, the Australian system requires that every set of men who have peculiar principles, may be represented on the official ballot on an exact and even equality with all the rest; but equally does the system require that no name shall appear more than once. Because the moment that is done constitutional equality is destroyed. This custom which has now been prohibited by law is a most vicious one. No intelligent man in the State of Michigan is ignorant of the bargains that have been made in the past between different political parties, local as well as general, of the fusions and trades that have been attempted and that have been made, and by which thousands of voters have been misled into voting for the man whom they believed was the representative of their conscientious convictions and principles, because his name appeared under their party label and the vignette adopted by that party. What worse fraud could be conceived of, if your honors please, than inducing a thousand voters to cast their ballot in favor of a man whom they have never seen and of whom they know nothing, but still voting for him in perfect trust and confidence, because seeing his name on their party ticket they believe he stands as their representative of party principles. If those thousand men voted for that man solely because of their seeing his name on their ticket, and when he got his name placed on their ticket by a corrupt deal by which the regular party candidate withdrew, or the convention itself refused to make a nomination, and the party committee afterward placed his name on by reason

of a deal, what worse fraud against the electoral system could be conceived of; certainly as bad and outrageous a piece of business as taking the ballots and afterwards destroying them and even refusing the electors a chance to vote at all. It is a notorious fact, that thousands of voters cast their ballot for the candidates of their party without any other consideration, that they would vote for the man whose name appeared on their party ticket when they would not think of voting for him if his name did not appear thereon, and that, in fact, if his name appeared on another ticket they would either refuse to vote for him at all, or vote for another man whose name appeared on another column of the same ballot. In short, the whole purpose in view, when a man's name is placed two or more times on the ticket, is to catch the votes of thousands of men who would not otherwise vote for him, and who by fraud and deception, are induced to vote for him, believing when they do so that he stands as the representative of their party.

To stop all of this, and to put an end to this outrage the act under consideration was enacted by the legislature, and for this legislation we have in this State an express constitutional warrant. Section six (6) of article seven (7) of the constitution reads as follows: "Laws may be passed to preserve the purity of elections and guard against the abuses of elective franchise." For this purpose and for this purpose alone, the act under consideration was passed, and by it this outrage against the purity of our elections will be stopped, corrupt deals will be ended, and a candidate will stand on his own merits or on the merits of the party which he represents, on an equal footing with all of his opponents. This law does not prohibit the voters casting their ballots for any man they desire. A man whose name appears but once on the official ballot may, so far as the law is concerned, receive every vote cast in the State of Michigan for that particular office. The object of the law is simply to compel a return to the first principles of the Australian system, and that is, that every man shall cast an honest ballot and shall know for whom he is voting. That it shall be the deliberate act of each individual elector, rather than the massing of voters and inducing them to cast their ballots under fraud and misapprehension for a person for whom they would not otherwise vote.

But it is asked, "Have not the political parties the right to name whoever they please as their candidate for an office?" My answer is, certainly they have, so long as they name a man who is eligible under the constitution and laws of this State, for the place. It would be conceded that a man who has lived in this country for years, who is not a citizen of the United States, could not be nominated for this office; that an American citizen who was born in this country, but who had not reached the age of twenty-five years, would not be eligible and, therefore, could not be nominated. And so I might state other reasons that would make a man ineligible for the position. But now the legislature in the exercise of its power steps in and assigns another reason. Not to prevent the party from nominating whoever it pleases, but from preventing that party from placing the name of that nominee on the official ballot provided that before that time he shall have been nominated by another political party organization. The place on their ticket must be left blank, and they can declare by resolution that the person whose name shall appear on another column is their candidate, and advise and urge every member of their party to vote for him; and there is nothing preventing a man from voting for him if he desires, if he will only take the trouble to put a cross oppo-

site the man's name who appears in the other column. But, if your honors please, this act requires a little thoughtful consideration and care, and it requires evidence of the voter's desire to vote for the candidate by taking his pencil and making a cross opposite his name. The act does not prevent the man receiving the votes but the act does prevent the name of the nominee of one party appearing in another column and thereby receiving votes of those who would never vote for him except from the fact of his name appearing in the column set aside for their party, whose principles they endorse and who they think the nominee stands for.

Again, it is stated that this law is void, because it places candidates and voters on an inequality. I have already answered this objection, by showing that the constitution requires that there shall be an equal election, and that all candidates shall be placed upon the official ballot on an even footing. The custom which prevailed and for which the relator is now contending violates this rule and places the candidate on an inequality by allowing the name of one candidate in two or more columns. The claim that the voters have not an equal chance has no foundation, because each voter can vote for any man on the ballot if he desires.

In my judgment it is unnecessary to extend this argument. I have already indicated sufficiently, I think, that this law is not unconstitutional nor illegal, but is one of the wisest and best laws which has ever been enacted by the legislature of the State of Michigan. If this be so, how can the relator hope to obtain a judgment of this court declaring that this wise law is unconstitutional, when it is a settled rule of constitutional law that "A court will not declare the statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural social or political rights of the citizen. It must always be shown when the act is claimed to be unconstitutional for such reasons, that such injustice is prohibited or such rights granted or protected by the constitution." (Cooley's Constitutional Limitations, sixth edition, p. 197.)

I think that the relator cannot convince this court that the provisions of this act are unjust or oppressive, and that no provision of the act violates his natural, social, or political rights. The claim that the act requires a political declaration or test from the candidate in violation of section 1 of article 18 of the constitution of Michigan, has, in my opinion, no legal foundation whatever. This section of the constitution provides, not that candidates for the legislature and for other offices shall take and subscribe to the oath therein named, but this is required of the successful candidate after he has been elected by the people and before he shall enter upon the duty of his office; and the following words, "and no oath, declaration or test shall be required for any office or public trust," have a well settled legal signification, as pointed out by Judge Campbell in *Attorney General v. Board of Commissioners of the City of Detroit*, 58 Mich., 213. So I say that this article of the constitution has nothing whatever to do with those who have not been elected.

It is said "that this act does not come within its title because that title is limited by section 6 of article 7 of the constitution, and in support of the claim, it is said that this statute does not involve the purity of elections nor the abuses of the elective franchise, that if the candidate's name is placed on the party ticket, even though it may be placed on some other party ballot, the purity of the election would not be imperiled nor would

the elective franchise be abused." If I have not already answered this point in what I have said before, I shall not be able to do so. I have said and I say again in answer to the point that hardly no greater outrage could be committed against the purity of elections than the vicious custom which has prevailed in this State by which a man who represents a party who believes in certain principles, can go to a man who has been nominated by another party who believes that the principles of the first party are all wrong and for a money consideration, entice the second candidate to withdraw from the ticket and get his own name inserted in place thereof, so that his name shall appear twice on the ballot, once as a candidate of a party believing in certain political principles, and in the second column standing as the candidate of the party opposing those political principles; if, I say, an act which was passed for the purpose of preventing this outrage, is not an act which has for its purpose the preventing of fraud and deceptions at elections in this State and sustained by the constitutional provision that such an act may be passed to preserve the purity of elections and to guard against the abuses of elective franchise then I ask how is it possible for an act to be passed for this purpose?

It is said "that the act forces the candidate to choose between the political parties that have nominated him within a certain five days, and provides for no notice to him of the dates on which returns are filed, and because of a default of notice by the candidate, which he may never have had the opportunity to give, the rights of political parties are determined by chance, and in different ways in different counties, if the chance falls differently." In my opinion there is no foundation whatever to this point. This whole matter is a matter of legislative regulation, for the purpose of providing the steps by which the law itself shall be made operative, and that the candidate himself shall have the opportunity of choosing within a reasonable time on which of the columns on the official ballot he desires his name to appear. It is the settled law of this State, if your honors please, that where judicial officers announce that they will withhold their judgment, and where the law provides that the party aggrieved thereby may appeal therefrom within five days after the rendition of the judgment, that the parties to the controversy must take pains to find out for themselves when the judgment is rendered, and that the time for taking the appeal begins to run from the rendition of the judgment, and that the aggrieved party cannot go to sleep and take no steps to find out when the judgment is rendered, and then complain because he did not know of it. If I may use the expression, the legislature took judicial notice of the fact that candidates for political offices are not spending much time in sleep at those times, and they and their friends are taking a lively interest in all that is going on, and that there would be no danger whatever of the candidate not ascertaining that which is a matter of public record, and of determining for himself in which column he desires his name to stand.

In closing this discussion, if your honors please, I desire to call attention to the election acts of several states which have lately adopted the Australian system:

See Star & Curtis' Annotated Statutes of Ills., Supplement, vol. 3, p. 564.
Indiana Stat., revision of 1894, Burns, vol. 3, p. 140, sec. 6222.
Statutes of Minn., 1891, vol. 1, p. 50, sec. 135, and form.
Supp. to the Pub. Statutes of Mass., 1882-8, p. 817.

These statutes, on examination, show what the true Australian system is, and show how much superior it is to our own. In each and every one of them it is required as a condition precedent before any man can have his name placed upon the official ballot, that all certificates of nomination or nomination papers shall, besides containing the names of candidates, specify as to each:

First, The office to which he is nominated;

Second, The party or political interest which he represents;

Third, His place of residence with street, if any.

Why, if your honors please, I venture the assertion that it was never dreamed of nor thought possible that a man's name could appear twice on this official ballot under the Australian system. The party or political principles which the man represents must always be named. There can be as many parties and as many political principles represented on the official ballot as is desired under the Australian system; but each party has a principle and that principle is represented by one man. But in Kentucky, where they have lately adopted the Australian system (see Kent. Stat. of 1894, p. 564, sec. 1454), the legislature has expressly provided that this shall not be attempted. Section 1454 reads as follows: "If any person has been nominated as a candidate for any office by convention, and also as a candidate for the same office by petition, his name shall be placed on the ballot but once, to wit, in the list of candidates nominated by such convention, and the place occupied by his name in said petition shall be left blank: *Provided*, That if such candidate shall, in writing, prior to the last day for filing nominations, request that his name be printed as nominated by petition, it shall be so printed, and shall be omitted from the list nominated by the convention." Here is the law of Kentucky, which stands upon the statute books unchallenged, similar to the laws for which I am contending.

I desire to say in conclusion, if your honors please, in answer to the claim that this is a partisan legislation and designated to promote the interest of one party, that, in my opinion, this objection could not be seriously made by one who had more than a superficial knowledge of the subject. "Times change and we change in them." Political parties have their birth, they exist for a while and then die, and others take their place, voters form new associations; and, therefore, what may be for the political advantage of one party today may be for its disadvantage tomorrow. But, if your honors please, while parties pass away we hope and believe, so long as time shall endure, that this nation of ours shall live. But certain it is, that if it is to continue to be a land of the free and the home of the blessed institutions which we now live under, we must preserve the sanctity of the ballot box upon which they all depend. We are making history today; the precedent which will be made by this decision will endure long after the men who make it have passed away, and long after the organizations which now exist have become parties of the past, but the precedent and the principles will live on, and the principles for which I contend, if carried out, will be a long step towards saving the ballot box from corruption and preserving the purity of the electoral system, and thereby securing the safety of the country.

FRED A. MAYNARD,

Attorney General.

FORM OF AUSTRALIAN BALLOT USED IN MASSACHUSETTS.

GOVERNOR.		Vote for ONE.
JOHN BOWLES, of Taunton,	Prohibition.	X
THOMAS E. MEANS, of Boston,	Democratic.	
ELIJAH SMITH, of Pittsfield,	Republican.	

GOVERNOR.		Vote for ONE.
JOHN BOWLES, of Taunton,	Prohibition.	
THOMAS E. MEANS, of Boston,	Democratic.	
ELIJAH SMITH, of Pittsfield,	Republican.	
GEORGE T. MORTON, of Chelsea.		X

OFFICIAL BALLOT—ELECTION 189 .

Cross out or scratch off the names of all persons, except for whom you wish to vote,

GOVERNOR,	Vote for ONE.
JOHN SMITH,	Democrat.
WILLIAM JONES,	Republican.
HENRY FISHER,	Independent.

Below the names of each candidate for each office nominated by the organized parties, as well as those nominated by electors, shall be left a blank space large enough to contain as many names in writing as there are offices to be filled.

FOR REPRESENTATIVE. . . .	Vote for TWO.
JOHN DOE,	Democrat.
RICHARD ROE,	Democrat.
HIRAM SMITH,	Independent.
HENRY JONES,	Independent.
WILLIAM CARTER,	Republican.
NATHAN HARDY,	Republican.

(Ark. Dig. of the statutes, 1894, p. 704, Sec. 2626.)

MICHIGAN OFFICIAL BALLOT—1894.

NAME OF OFFICE VOTED FOR.	REPUBLICAN TICKET. O	DEMOCRATIC TICKET. O	PEOPLE'S PARTY. O	PROHIBITION PARTY. O
CONGRESSIONAL. Representatives in Congress, second congressional district -----	<input type="checkbox"/> George Spaulding.	<input type="checkbox"/> Thomas E. Barkworth.	<input type="checkbox"/> Thomas E. Barkworth.	<input type="checkbox"/> David W. Grandon.
LEGISLATIVE. Representative second district -----	<input type="checkbox"/> Arthur W. Saxton.	<input type="checkbox"/> Corydon E. Pierce.	<input type="checkbox"/> Corydon E. Pierce.	<input type="checkbox"/> George Hong.

MINNESOTA STATE BALLOT.

FORM OF BALLOT—MICHIGAN, 1895.

NAME OF OFFICE VOTED FOR.	REPUBLICAN TICKET.	DEMOCRATIC TICKET.	PROHIBITION TICKET.	FREE SILVER TICKET.	PEOPLE'S PARTY TICKET.
CONGRESSIONAL. Representative in Congress—third congressional dis- trict.-----	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
	<input type="checkbox"/> Alfred Milnes.	<input type="checkbox"/> Patrick H. Gilkey.	<input type="checkbox"/> Albert M. Todd.	<input type="checkbox"/> Albert M. Toad.	<input type="checkbox"/> Albert M. Todd.
Governor—CYRUS G. LUCE,—Republican.	X				
Governor—GEORGE L. YAPLE,—Democrat.					
Governor—SAMUEL DICKIE,—Prohib'n.					
Governor —					
					Vote for one.
Lieut. Gov.—JAMES H. McDONALD,—Repub.	X				
Lieut. Gov.—S. S. CURRY,—Democrat.					
Lieut. Gov. CHARLES MOSHER,—Prohib'n.					
Lieut. Gov.—					
					Vote for one.
Secretary of State—GIL R. OSMUN,—Re- publican.	X				
Secretary of State—P. B. WACHTEL,—Dem.					
Secretary of State—JOHN EVANS,—Prohib.					
Secretary of State—					
					Vote for one.
State Treasurer—GEORGE L. MALTZ,—Re- publican.					
State Treasurer—WM. G. BEARD,—Dem.	X				
State Treasurer—AARON C. FISHER,—Pro.					
State Treasurer—					
					Vote for one.
State Auditor—HENRY H. APLIN,—Repub.					
State Auditor—JOHN D. FRARRAR,—Dem.					
State Auditor—S. B. WILLIAMS,—Prohib.	X				
State Auditor—					
					Vote for one.
Attorney General—MOSES TAGGART.					
Attorney General—JOHN C. DONNELLY,— Democrat.					
Attorney General—JAMES R. LAING,—Pro.					
Attorney General—					
					Vote for one.
Associate Just. Sup. Ct.—JOS. H. ESTA- BROOK,—Republican.					
Associate Just. Sup. Ct.—DAVID PARSONS, —Democrat.					
Associate Just. Sup. Ct.—DAVIS BEMIS,— Prohibition.					
Associate Just. Sup. Ct.—					
					Vote for one.

TODD v. BOARD OF ELECTION COMMISSIONERS OF KALAMAZOO, CALHOUN, BRANCH, EATON, AND HILLSDALE COUNTIES.

(Supreme Court of Michigan. March 25, 1895.)

Elections—Printing names of candidates—Constitutional law.

1. Act March 14, 1895, prohibiting the printing on the official ballot of the name of a candidate receiving the nomination of two or more parties in more than one column, is a valid exercise of the constitutional power (Const. Art. 7, § 6) "to pass laws to preserve the purity of elections and guard against abuses of the elective franchise."
2. Act March 14, 1895, prohibits the printing on the official ballot of the name of a candidate receiving the nomination of two or more parties in more than one column, and provides that, in case the candidate does not notify the election commissioners, within five days after his name has been certified to them as having been nominated by two or more parties, in the column of which party he wishes his name to be printed, the commissioners shall print his name in the column of the party first notifying them of his nomination. *Held*, that such act does not have a retrospective effect, so as to deprive a candidate of the right to have his name appear in the column of each party, where the time for making his election as to which column his name shall appear in had expired before the law went into effect.

Application upon the relation of Albert M. Todd against the board of election commissioners of Kalamazoo and other counties for writ of *mandamus* to compel defendants to place his name upon the election tickets of three different parties as candidate for representative in congress. Writ allowed.

Myron H. Walker (*E. M. Irish* and *Howard & Roos*, of counsel), for relator. *Fred A. Maynard*, Attorney General (*Moses Taggart*, of counsel), for respondents.

LONG, J. The relator was nominated on February 28, 1895, as a candidate for representative in congress by the prohibition party for the third congressional district of Michigan, and on March 7 he was nominated for the same office by the free silver party. On February 27 the people's party nominated one Robert McDougall for the same office. On March 8 Robert McDougall withdrew as a candidate upon the people's party ticket, and the relator was substituted in his stead by the congressional committee of the people's party, such committee certifying that they were authorized by the convention to fill any vacancy upon such ticket. Certificates were filed with the election commissioners, March 7, 8, and 9. The relator claims that he has the right, under act No. 190 of the public acts of 1891, to have his name printed upon each of these three tickets. On March 14, 1895, an amendatory act was passed by the legislature to the election law, and given immediate effect, and respondent's claim that under the terms of this amendatory act the relator is not entitled to have his name appear upon the official ballot more than once. This amendatory act provides that "it shall be unlawful for the said board of election commissioners to cause to be printed in more than one column on the ballot the name of any candidate who shall have received the nomination by two or more parties or political organizations for the same office."

The act contains further provisions, relating to the manner in which a choice is to be made by the candidate as to the place which his name shall have on the ballot as follows: "Any person so receiving the nomination for the same office by two or more parties or political organizations shall, within five days after his name has been certified to said election commission as having been nominated by two or more political parties for the same office, give notice to the board of election commissioners of each county in the State, if said nomination be for a State office, and to the board of election commissioners of each county in the district, if said nomination be for a congressional, judicial or legislative office and to the board of election commissioners of the county, if such nomination be for a county office, specifying in such notice the column of which party or political organization on the ballot he wishes his name to be printed, and said board of election commissioners shall print the name of such candidate in such column on the ballot so specified by him, and in no other column. Such notice shall be given to said election commissioners by delivering the same either in person or by depositing the same in the postoffice, in a sealed envelope, with postage prepaid, directed to the chairman of such board of election commissioners at the county seats of the respective counties: *Provided further*, That in case any such candidate so nominated by two or more parties or political organizations for the same office and whose names shall have been certified by the chairman and secretary of the committees of such parties or political organizations to said board of election commissioners, within the time and as above provided shall refuse or neglect to give notice to said board of election commissioners as above provided, and within the time above named, specifying in which column on the ballot he wishes his name to be printed, then in such case said board of election commissioners shall cause his name to be printed in the column of the party or political organization, from the chairman and secretary of whose committee said board of election commissioners shall have first received notice of such person's nomination for said office, and said board of election commissioners shall not cause the name of such person to be printed on the ballot as a candidate for the same office in any other column." The relator contends: (1) That this amended law is wholly unconstitutional, for the reason that it discriminates between political parties, and imposes a political test as a condition to one becoming a candidate for office. (2) That if the statute be upheld as constitutional as applied to future elections, in which the opportunity is given to parties and candidates to act under the law, it cannot be so far given retroactive effect as to make it applicable to a case like the present, where the nominations of the parties had been made, and the time within which, under the terms of the act, the candidate is required to make his election as to the place which his name is to have on the ballot has expired before the act took effect.

1. The constitutional question is one of unusual importance, and as the exigencies of the present case demand a prompt decision, in order that the rights of the relator may be protected, and as we have reached the conclusion that the act is valid, and within the power of the legislature, acting under the provisions of article 7, § 6, of the constitution, which provides that "laws may be passed to preserve the purity of elections, and guard against abuses of the elective franchise," and as the relator in the present case is entitled to his remedy without delay, we have

thought it best to direct the entry of the order, and withhold a written opinion upon the main point until we shall have the opportunity to formulate our views upon that question, and an opinion upon the full case covering that question will be handed down later.

2. We are of the opinion that the amendatory act of March 14 cannot be held applicable to the present case. The time within which the candidate is authorized by law to exercise his choice of tickets had in the present case expired before the law took effect. He, therefore, under the law, had no opportunity to exercise the right conferred. If it be attempted to apply the terms of this act to the present case, the election commissioners would be bound under the other provisions of the act to print the name of the candidate on the ticket first certified, thus excluding wholly the right of choice plainly intended to be conferred by the statute. The general rule is well settled in this State and elsewhere that all statutes are prospective in their operation, except when a contrary intent is clearly evidenced by the context. *Heineman v. Schloss*, 83 Mich., 153, 47 N. W., 107; *Stitt v. Casterlin*, 89 Mich., 239, 50 N. W., 847; *Smith v. Pinch*, 80 Mich., 332, 45 N. W., 183; *Finn v. Haynes*, 37 Mich., 63; *Maxwell v. Bridge Co.*, 46 Mich., 278, 9 N. W., 410; *Manufacturing Co. v. Adsit*, 88 Mich., 244, 50 N. W., 140. The rule to be derived from a comparison of a vast number of judicial utterances upon this subject seems to be that, even in the absence of constitutional obstacles to retroaction, a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is expressed by a clear and positive command, or to be inferred by necessary, unequivocal, and unavoidable implication from the words of the statute, taken by themselves and in connection with the subject matter, and the occasion of the enactment admitting of no reasonable doubt, but precluding all question as to such intention. *End. Interp. St.* § 271. Judge Cooley, in his work on constitutional limitations (2d Ed., p. 370), referring to this subject, says: "Legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should act retrospectively; and some of the states have deemed it just and wise to forbid such laws altogether by their constitutions." As is said in Potter's *Dwarris on Statutes and Constitutions*, in a note on page 163: "Although the words of the statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein." The act grants the right of choice of tickets, but compels the choice within a time that had already expired in the present case when the act took effect, and then in express terms provides that if the choice is not made by the candidate within that time the election commissioner shall print his name in the ticket first certified. There is no other alternative under the act but that, if the choice is not made by the candidate within the time, his name must be printed upon the ticket first certified and if we hold that the relator may have further time beyond the time fixed by the act we must interpolate something into the statute. If this be done, what time shall be fixed when the relator must make his choice? What is to guide us in fixing that time? Certainly not the act itself, but an arbitrary rule which we must adopt, and which is not contained in the act. It cannot be presumed from the language of the statute that the legislature

intended such a result as that one who could not conform to the provisions of the act, for the reason that the proceedings in his case had so far progressed as to render compliance by him with the terms of the act impossible, should be held within the act. The writ must issue to the election boards of the counties named, directing such boards to print the relator's name upon all three tickets mentioned.

MCGRATH, C. J., did not sit. GRANT and HOOKER, J.J., concurred with LONG, J.

MONTGOMERY, J. I concur in the foregoing opinion, so far as it holds that the right of the present relator cannot be affected by the provisions of the act of March 14. As this holding disposes of the case, I do not deem it necessary to set forth my views upon the question of the constitutionality of the act. (N. W. Rep., Vol. 62, 564.)

TODD v. BOARD OF ELECTION COMMISSIONERS.

(Opinion filed October 1, 1895.)

At the time of the hearing of the application in this matter a brief opinion was filed upholding the constitutionality of the act in question. The following is the written opinion upon the questions involved in that decision.

GRANT, J. A brief opinion was filed in this case upon the hearing and is found in 52 N. W. R., 564. The provision of the constitution empowering the legislature to enact laws to preserve the purity of elections and the provisions of the statute are sufficiently stated in that opinion. For want of time a written opinion upon the constitutional question was then withheld.

If the effect of this act as is strenuously argued by the learned counsel for the relator, is to "subvert or impede the right to vote," it is clearly unconstitutional. If, on the contrary, it neither subverts nor impedes, but only regulates that right it is constitutional. As experience has disclosed corruption, fraud, venality and assaults upon the purity of the ballot, the legislatures of the several states have enacted laws to prevent them. Few if any of these enactments have escaped attack in the courts and the charge against them has usually been that they are unconstitutional and infringe upon the sacred and constitutional rights of the citizen. The registry law of this State was attacked. So also were the laws providing for the present system, the quasi Australian ballot. The effect of those laws has been to render voting more inconvenient, to require greater care on the part of the elector and to sometimes deprive him of his vote. The elector who has failed, through forgetfulness or other reason, to register on the days provided by the law, must lose his vote, unless he was sick or absent from the township on business and without intent to avoid registration. The elector may not desire to vote for any man upon the ballot and in that case he must erase the name of the objectionable candidate and write another name or mark some name for the same office upon another ticket, or lose his vote for that office. He

may innocently make certain marks prohibited by law or he may innocently show his ticket, either of which will cause the loss of his vote.

These and other similar provisions designed to secure an honest election and to preserve "this most precious right to those who are entitled to enjoy it," have been sustained by the courts. The constitution does not guarantee that each voter shall have the same facilities with every other voter in expressing his will at the ballot box, or, to apply the rules to the present cases it does not guarantee to each voter the right to express his will by a single mark. The constitutionality of the law is not to be tested by the fact that one voter can cast his ballot by making one mark while another may be required to make two or more to express his will. When each has been afforded the opportunity and been provided with reasonable facilities to vote the constitution has been complied with. All else is regulation and lies in the sound discretion of the legislature to whom alone such regulation is committed. Courts cannot hold them unconstitutional because in their judgment they are harsh or unwise or have their origin in partisan purposes. Constitutional laws often have their origin in such purposes and unconstitutional laws are often based upon pure motives and honest intentions. Courts have nothing to do with the motives of legislators nor the reasons they have for passing the law. The polar star of interpretation to guide them is the language of the constitution itself and the sole question always is, does the law destroy or abridge the right?

It is well perhaps to refer to some of the decisions of this court as to the power of the legislature to pass acts to maintain the purity of elections which is expressly conferred upon them by the constitution, Art. 7, Sec. 6.

In *Chateau v. Board of Election Commissioners*, 88 Mich., 170, a candidate for alderman claimed the right to have his name appear upon the official ballot as a candidate on the citizens' committee's independent ticket. He had the right to be a candidate but it was held he had no right to have his name printed upon the official ballot because it did not appear that he was selected by any assemblage of electors of his ward, and that anybody could vote for him by writing his name upon the ballot.

In *Common Council v. Rush*, 82 Mich., 532, it was held that parties might place a county ticket upon the official ballot as the law then stood, and if they desired to vote for any state ticket they could erase the county ticket and place their own in its stead. In that case one voter would be put to more trouble in preparing his ballot than another.

In *Attorney General v. May*, 99 Mich., 538, we said that every presumption is in favor of the constitutionality of the law, citing the authorities.

In *Attorney General v. Detroit*, 73 Mich., 545, it was said "in order to prevent fraud at the ballot box it is proper and legal that all needful rules and regulations be made to that end; but it is not necessary that such rules and regulations shall be so unreasonable and restrictive as to exclude a large number of legal voters from exercising their franchise. * * *

The power of the legislature in such cases is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise, and by preventing its abuse. The right to vote must not be impaired by the regulation. It must be regulation, not destruction."

In *Common Council v. Rush*, supra, we held that it was "the exclusive province of the legislature to enact laws providing for the registration of

voters, and the time, place and manner of conducting elections. It may regulate but can not destroy, the enjoyment of the elective franchise. Whether such regulation be reasonable or unreasonable is for the determination of the legislature, and not for the courts, so long as such regulation does not become destructive. * * * When power is conferred upon the legislature to provide the instrumentalities by which certain objects are to be accomplished, the sole right to choose the means accompanies the power, in the absence of any constitutional provisions prescribing the means. The finding by this court that the law impeded, hampered or restricted the right to vote, and is therefore void, would be a clear assumption of, and encroachment upon, legislative power—a substitution of our judgment for that of the legislature. It can only be declared void when it destroys the right. Its unconstitutionality can be determined by no other rule."

See also *Attorney General v. McQuade*, 94 Mich., 439. Other decisions by this and other courts might be cited and quoted from, but the above are sufficient to establish the rule by which courts must be governed in determining the constitutionality of acts passed by the legislature for the purity of elections.

The rule is thus stated by Justice Cooley: "All such reasonable regulations of the constitutional right which seem to the legislature important to the preservation of order in elections, and guard against fraud, undue influence and oppression, and to preserve the purity of the ballot box, are not only within the constitutional power of the legislature, but are commendable, and at least some of them absolutely essential."

Cooley's Con. Lim., 753.
Paine on Elections, Sec. 301.

The voter, if he belonged to any other party than the free silver or republican party, would see at a glance that there was no candidate for congress upon his ticket, and that there were only two candidates for that office upon the ballot. After having made the cross in the space at the head of his party ticket, if he desires to vote for either of the candidates appearing on the ballot, he would then make another cross in the square opposite the name. If he desired to vote for neither of these but for some other man, he would write the name in the blank space on his party ticket. Any voter, able to read, could in a few seconds prepare his ballot. Is this destructive of the elective franchise? Does it destroy the full, free and intelligent exercise of that precious right, which is essential to the perpetuity of our government? To so hold would be absurd and further argument can not make it clearer.

In the light of this well established rule let us examine the official ballot to ascertain what the voter is required to do in order to cast his vote under this law. When he enters the booth with his ballot he seeks that portion of it representing his political affiliations. We will assume that the law was in force at the election in question, that relator was first nominated by the free silver party, that he was also the nominee of all the other parties except the republican, and that he elected to have his name appear upon the ballot on the free silver ticket. The ballot, aside from the vignettes and instructions, would be as follows:

ANNUAL REPORT OF THE

NAME OF OFFICE VOTED FOR.	REPUBLICAN TICKET.	DEMOCRATIC TICKET.	PROHIBITION TICKET.	PEOPLE'S PARTY TICKET.	FREE SILVER PARTY TICKET.
<i>State.</i>					
Justice of the Supreme Court.....	<input type="checkbox"/> Joseph B. Moore.	<input type="checkbox"/> John W. McGrath.	<input type="checkbox"/> Myron H. Walker.	<input type="checkbox"/> Robin B. Taylor.	<input type="checkbox"/>
Regents of the University.....	<input type="checkbox"/> Roger W. Butterfield.	<input type="checkbox"/> Charles T. Falithorp.	<input type="checkbox"/> Noah W. Cheever.	<input type="checkbox"/> George B. Smith.	<input type="checkbox"/>
<i>Congressional.</i>					
Representative in Congress (Third Congressional District.)	<input type="checkbox"/> Charles H. Hackley.	<input type="checkbox"/> Stanton D. Brooks.	<input type="checkbox"/> Delaven B. Reed.	<input type="checkbox"/> Varnum J. Bowers.	<input type="checkbox"/>
<i>County.</i>					
County Commissioner of Schools	<input type="checkbox"/> Alfred Milnes.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Albert M. Todd.
	<input type="checkbox"/> Ashley Clapp.	<input type="checkbox"/> Russell G. Smith.	<input type="checkbox"/> Samuel McKee.	<input type="checkbox"/> Samuel McKee.	<input type="checkbox"/>

To what extent is the voter impeded? If he belongs to the democratic or prohibition or people's party and desires to vote for a congressional candidate, he is required to make two crosses or marks instead of one. If he can not read he is certainly not impeded, because the parties, sworn to assist him in preparing his ballot, will readily inform him upon the subject and mark it according to his wishes. It would be much more difficult to prepare a ballot under the pure Australian system, where each name must be marked. It would be a serious reflection upon the intelligence of the voters of Michigan to hold that they could be deceived by such a ballot or impeded in the right to vote. Especially is this true in view of the means of disseminating intelligence through the newspapers, upon the hustings, by printed posters, and the importunities of candidates and their friends.

It is however said that the voter has the right to suppose that all his party nominees will be on his party ticket. The constitution neither expressly nor impliedly confers any such right. If he be possessed of any intelligence whatever he can not fail to see at once the vacant space upon the ticket and to know that if he desires to vote for a congressman he must check one of the two candidates or write a name in the blank space. Both the opportunity and the facility to vote are afforded. If it be said that the voter, who does not examine his ticket, may by this means be deprived of his vote for an office, it may also be said with equal certainty that if another candidate than the one nominated by the convention is upon it he will probably vote for the man, who, he had no reason to suppose, was on his ticket and for whom he never intended to vote. The ballot prepared under the present law challenges the voter's attention by the vacant space upon his party ticket to the fact that if he desires to vote for a candidate for that office he must seek his name upon other tickets or write a name upon his own ticket. It is apparent that this law will tend to secure a more intelligent vote than if the name of the candidate was upon all three tickets. It is alleged in the answer that the convention of one of the political parties did not expressly authorize its committee to fill any vacancy, and that its congressional candidate withdrew and such committee placed the name of the relator upon its ticket. It is alleged by the respondents that corrupt bargains have been made between unscrupulous managers of different political parties, by which one candidate has been bought off and another substituted and that new political parties have been organized by unscrupulous men for the sole purpose of bargain and sale, and that the purpose of this law is to prevent these corrupt deals between corrupt politicians. No fraud is charged in the present case, but it affords an illustration of the opportunities for such trades which every good citizen condemns and which should, if possible, be prevented by law.

It is also insisted that the candidate has the constitutional right to have his name appear upon the ticket of every party which endorses him. It gives every candidate the right to have his name appear upon the ticket once. Naturally it belongs in the column of that party with which he is openly affiliated, but if he chooses to have his name attached to the ticket of some other party and that party does not object, he possesses that right. But I know of no reason or authority for saying that any candidate possesses the constitutional and inalienable right to have his name appear more than once upon the official ballot containing the tickets of two or more political parties. The Australian ballot contemplates that

his name shall be there but once. It follows then that every voter has a reasonable opportunity to vote for him. This is the sole constitutional right guaranteed him. He has no occasion to find fault so long as he is permitted to have his name upon the ballot upon such ticket as he chooses, with the constitutional right following of an opportunity given to every voter to vote for him, which he can do by simply making two crosses instead of one.

The law is general and aims at no political party. One party may be affected at one election and another at another, or all parties may be affected at one election, some in one locality and others in another. It does not prevent coalition between different political parties, which is often very commendable and patriotic. It does not deprive the members of those political parties of the means to put their coalition into effect by their votes, but furnishes all reasonable facilities for so doing. It only requires some degree of intelligence and care on the part of the voters.

We hold the law to be constitutional.

MCGRATH, C. J., did not sit.

LONG and HOOKER, JJ., concurred with GRANT, J.

FLINT & P. M. R. R. CO. v. BOARD OF STATE AUDITORS.

(Supreme Court of Michigan. Nov. 20, 1894.)

Costs against State—Interest—Warrant for payment.

1. How. Ann. St., § 8984, provides that in all civil suits in the name of the State by any authorized officer, and not on the relation of any citizen, the people shall be liable for costs to the same extent as if the suit was instituted by an individual, and section 7756 provides that every such suit shall be subject to all the provisions of law respecting similar suits in the name of any citizen. *Held* that, as judgments for costs against citizens bear interest from date thereof, such a judgment against the State bears interest also.
2. As How. Ann. St., § 7757, provides that in case of a judgment against the people for costs the Auditor General shall draw a warrant for the amount thereof, on production of a copy of the judgment with a taxed bill of costs, and a certificate of the Attorney General that the suit was duly instituted, it is not necessary to have such a claim audited by the Board of State Auditors.

Petition for a writ of *mandamus* by the Flint & Pere Marquette Railroad Company against the Board of State Auditors. Denied.

Wm. L. Webber, for relator. *A. A. Ellis*, Attorney General, for respondent.

MONTGOMERY, J. The State, on relation of the Attorney General, commenced suit in chancery against the relator for the recovery of certain lands. On appeal to the supreme court of the State, the railroad company prevailed, and a decree was entered that defendant recover costs of both courts from the State, 51 N. W., 103. This order was made in December, 1893. Before the costs were finally taxed, an appeal was taken to the supreme court of the United States on behalf of the State, which was, on

March 12, 1894, dismissed, and an order entered that defendant recover costs in that court. 14 Sup. Ct. 586. Relator filed its bill for costs with the Board of State Auditors, and claimed to recover interest upon the amount of costs awarded in the State court from the date of judgment, and upon the costs of the United States supreme court from the date of the judgment of that court; the total charge for interest being \$173.33. The interest charged was disallowed, and *mandamus* is asked to compel the allowance of this item. Some question is made as to whether, under the statute, the Board of State Auditors have any duty to perform in connection with the allowance of a claim for costs; but, as both parties desire an expression of the court upon the merits, we do not pause to consider this question, except to refer to section 7757, How. Ann. St., to which further reference will be made hereafter.

The important question is whether relator is entitled to interest upon the judgment. It is conceded by counsel, and may be treated as settled by this court in *Hayden v. Hefferan*, 99 Mich., 262, 58 N. W., 59, that in suits between individuals the prevailing party is entitled to interest upon the costs from the date of the judgment or decree. But it is contended by the Attorney General that the State is not liable for interest on demands under the general provision of the statute relating to interest, and in this contention he is supported by the uniform current of authority. *U. S. v. North Carolina*, 136 U. S., 211, 10 Sup. Ct., 920; *U. S. v. Sherman*, 98 U. S., 567; *State v. Board of Public Works*, 36 Ohio St., 409; *Western & A. R. Co. v. State*, 14 L. R. A., 438. But it is contended by relator that the statutes in this State relating to judgment against the State render the State liable for interest on costs the same as in case of individuals. Section 8984, How. Ann. St., provides that "in all civil suits or proceedings by or in the name of the people of this State, instituted by any officer duly authorized for that purpose, and not brought on the relation, or for the use of any citizen, or upon any penal statute, the people shall be liable for costs in the same cases, and to the same extent, as if such suit or proceeding were instituted by an individual." Section 7756 provides that "every suit or proceeding in a civil cause instituted in the name of the people of this State, by any public officer duly authorized for that purpose, shall be subject to all the provisions of law respecting similar suits or proceedings, when instituted by or in the name of any citizen, except where provision is or shall be otherwise expressly made by statute; and in such suits and proceedings, the people of this State shall be liable to be nonsuited, and to have judgment of *non pros.* or of discontinuance entered against them, in the same cases, in like manner, and with the same effect, as in suits brought by citizens, except that no execution shall issue thereon. The succeeding section (7757) provides that "whenever costs shall be adjudged against the people of this State, in any civil suit or proceeding instituted by any officer duly authorized for that purpose, it shall be the duty of the Auditor General to draw on the treasurer for the amount thereof, upon the production of an authenticated copy of the record of judgment, or of the order adjudging such costs, with a taxed bill thereof, and upon the certificate of the Attorney General that such suit or proceeding was duly instituted, as the law required.

These provisions are very broad, and, we think, clearly evidence an intention to subject the State to precisely the same liability for costs, and

for the incidents of a judgment, as an individual is subject to, with the single exception relating to the method of collecting the demand. In *U. S. v. Sherman* the statute provided that in suits against public officers, where recovery shall be had in any such suit, and the court shall certify that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the secretary of the treasury, or other public officer of the government, no execution shall issue against the collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury. It was held in this case that interest should not be allowed. But there was no federal statute considered which so broadly imposed upon the government the same obligations as those resting upon an individual; and, further, it was truly said in that case: "When the certificate is given, the claim of the plaintiff in the suit is practically converted into a claim against the government. But not until then. Before that time the government is under no obligation, and the secretary of the treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given. The act of congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by federal legislation, declared to bear interest. Such legislation, however, has no application to the government. And the interest is no part of the amount recovered." We think the reasoning in this case would be conclusive were it not for the provisions above quoted from sections 8984, 7756. But while the word "interest" is not used in either of these sections, we think they are sufficiently broad to require the payment of the same sum in discharge of a judgment for costs as would be required to be paid by an individual. Section 7757, above quoted, does not require the auditing of this account by the Board of State Auditors. It is made the duty of the Auditor General to draw his warrant upon the treasury for the amount of the costs. It will be unnecessary to issue a writ in the present case. The other justices concurred. (60 N. W. Rep., 971.)

STATE vs. CITY NATIONAL BANK OF LANSING. Trespass on the case upon promises.

In the above entitled cause suit was brought against the City National Bank of Lansing, for the reason that said defendant refused to pay over certain sums of money deposited in said bank by August W. Lindholm, Deputy Secretary of State, during the time that he was Deputy Secretary of State; and that said defendant then and there well knew that the said several sums of money were public money and the property and effects of the said plaintiff. That on the 20th day of March, A. D. 1894, the said August W. Lindholm was removed for cause from his office of Deputy Secretary of State, and that upon said day one Joseph W. Selden was duly appointed, qualified and entered upon the discharge of the duties of Deputy Secretary of State in and for the State of Michigan. That at the

time of the removal of the said August W. Lindholm from his office as aforesaid, the several sums of money so on deposit with the said defendant were still in the possession of the said City National Bank.

On the 3d day of April, A. D. 1894, the said Joseph W. Selden, Deputy Secretary of State aforesaid, made a verbal demand upon said defendant for and on behalf of said plaintiff for the said several sums of money so in the hands of the said defendant, and that upon the 5th day of April, A. D. 1894, a second and written demand was made upon the said defendant for the several sums of money as aforesaid, by the Attorney General of the State of Michigan, for and on behalf of said plaintiff.

On October 9, 1894, the case was settled by the bank paying over all moneys, less costs of suit.

MANDAMUS AND OTHER PROCEEDINGS PENDING.

State vs. Hulbert H. Warner *et al.*

People *ex rel.* Attorney General vs. the Board of Supervisors of Cheboygan County *et al.*

The East Jordan Lumber Co. vs. Henry W. Stewart.

Attorney General *ex rel.* George H. Barbour vs. the Board of Supervisors of Wayne County.

SCHEDULE C.

Schedule C contains a list of *quo warranto* proceedings, commenced either by the Attorney General upon his own relation, or by the Attorney General upon the relation of some other person.

THE PEOPLE ex rel. LOUIS M. HARTWICK, Prosecuting Attorney, vs.
ALBERT G. AVERY. *Quo warranto*.

This is a proceeding commenced by the prosecuting attorney of Oceana county, Michigan, by information in the nature of *quo warranto*, against the respondent, Albert G. Avery, requiring him to show by what authority he assumed and is exercising the office of trustee of the village of Shelby, Oceana county, said information having been duly filed and served on the respondent. Thereupon, the said respondent on the 30th day of April, 1894, filed his plea wherein he alleges that he is trustee of the village of Shelby, and that he is acting and has assumed and is exercising all the duties of said office, that he has assumed and is exercising all the duties of the said office of trustee of said village, by reason of having been on the 12th day of March, 1894, duly elected to said office at the annual village election held in said village on that day, by having received a majority of all the legal votes cast at said election for the office of trustee, and having been duly declared elected to said office and having duly qualified and assumed and exercised the duties as such. Afterward the said prosecuting attorney on behalf of the said people filed his replication to said plea in due form of law. Said issue was tried before the court without a jury.

The circuit court found as a conclusion of law that said Albert G. Avery, respondent, was duly elected to the office of trustee of the village of Shelby, at the annual election in said village held on the 12th day of March, 1894, and judgment was entered accordingly. The supreme court affirmed judgment—no costs—December 7, 1894. On January 5, 1895, motion for costs entered and granted. Respondent's costs taxed at \$49.00 on February 19, 1895.

ATTORNEY GENERAL ex rel. MICHAEL S. GRIFFIN vs. REUBEN C. TASKER.
Quo warranto.

This was an information in the nature of *quo warranto* to determine the question whether the relator or the respondent received the greater number of legal votes cast in the county of Bay, at an election held in the city of West Bay City, on the 3d day of April, 1893.

Judgment was rendered for relator November 7, 1894. Case was reargued and submitted November 20, 1894, and the judgment of November 7 vacated and judgment was rendered for respondent on January 8, 1895.

ATTORNEY GENERAL ex rel. JAMES A. SCOTT vs. CHARLES GLASER.
Quo warranto. Judgment of ouster.

This was an information in the nature of *quo warranto* to determine the question whether the relator or the respondent received the greater number of legal votes cast in the county of Bay, at an election held in the city of West Bay City, on the 3d day of April, 1893.

Judgment for relator November 7, 1894. Case reargued and submitted November 20, 1894. Judgment affirmed January 8, 1895.

ATTORNEY GENERAL ex rel. BEREND KAMPS vs. GOVERT KEPPEL.
Quo warranto.

The information in this case was filed to test the title to the office of the president of the village of Zeeland of Ottawa county. The plea being in the usual form, and alleged that at the election held on the 17th day of April, 1894, Berend Kamps, relator, was duly elected and chosen president of said village for the full term of one year.

On December 17, 1894, judgment rendered for respondent.

QUO WARRANTO PROCEEDINGS PENDING.

People *ex rel.* James Francis vs. Fred J. Northway.
Attorney General *ex rel.* Neil McKinnon vs. George H. Ecoles.
John Harwood, relator, vs. Francis C. Stillson, defendant.

**THE PEOPLE, ex rel. ATTORNEY GENERAL vs. THE FARMER'S AND HORSE-
MEN'S MUTUAL LIVE STOCK INSURANCE COMPANY, of Ypsilanti, Mich-
igan. Receiver appointed.**

This is a case where, upon careful examination, in accordance with the law, into the affairs of said company, the Commissioner of Insurance found that there were losses adjudged due and unpaid, amounting to about \$1,600, and that the total amount of assets which said company had to pay said losses was \$30; leaving a balance of liabilities over assets of \$1,574.55. That said losses so adjudged were due and unpaid for more than one year. And, upon further reasons deduced through careful investigation, the said Commissioner of Insurance found that he had sufficient evidence that said company was not conducting its business in compliance with the act under which it was organized, and thereupon reported his findings to the Attorney General.

After thorough examination of such evidence, papers and statements, and the reports so made to him, the Attorney General became satisfied that said company was not conducting its business in compliance with the provisions of the act under which it was organized, and forthwith petitioned the circuit court for the county of Washtenaw, State of Michigan, for an appointment of a receiver, for the purpose of winding up the affairs of said company.

On October 2, A. D. 1894, H. B. Adams of Ypsilanti, Michigan, was duly appointed receiver, and on October 10th of the same year an order was made directing said receiver to make an assessment of one thousand dollars to pay the debts of said company.

**THE ATTORNEY GENERAL ex rel. ORREN SCOTTEN et al. vs. THE BOARD OF
SUPERVISORS of Wayne County. Appeal from Wayne. Injunction affirmed.**

This is a case wherein the legislature of 1893 empowered the board of supervisors of Wayne county to bond said county for \$1,500,000 for the purchase of a site, and for the erection of county buildings thereon. The question was submitted to the people of the county, at the general election held on the 6th day of November, 1894. The total number of votes cast were 16,750, of which the total number of yea votes were 13,308, and the total number of nay votes 3,442.

Complainants instituted proceedings against defendant, claiming that the issuing of bonds and the election were illegal.

The cause was heard on the pleadings, and on the proofs taken in open court in the circuit court for the county of Wayne, in chancery. The court, having duly considered the pleadings, proofs and arguments, held that the vote made on the 6th day of November, 1894, on the subject of authorizing a loan for a county building, jail and sheriff's residence, and all proceedings of said defendant and of all of its committees relating thereto or based thereon were illegal and void. Said court further held that the injunction granted for said cause be made perpetual.

This case was appealed from Wayne county to the supreme court, and upon hearing the same at the January, 1895, term of court, the latter tribunal affirmed the finding of the lower court.

SCHEDULE D.

Schedule D contains a list of *chancery* cases commenced or now pending, in which the State was directly interested.

THEODORE C. SHERWOOD, Commissioner of Banking, vs. THE COMMERCIAL AND SAVINGS BANK, of Ludington, Mich. Bill for appointment of receiver. Receiver appointed.

This is a case whereupon due complaint made on the 23d day of August, 1894, by said Commissioner of Banking, by virtue of his office, by and with the approval of the Attorney General, against said Commercial and Savings Bank, a *receiver* was appointed for said bank with full power to act in compliance with the law governing such office. Upon amicable settlement of the affairs of said bank, all debts having been paid, said *receiver* was discharged.

THE PEOPLE vs. WISCONSIN CENTRAL RAILROAD COMPANY. Bill in chancery to enforce specific tax. Decree granted May 13, 1895.

MARIA B. PINCKNEY vs. THE COMMISSIONER OF THE STATE LAND OFFICE. Bill to restrain sale of land.

Above entitled cause was settled by complainant paying over the requisite amount of money demanded by defendant in accordance with the law.

LIST OF CHANCERY CASES PENDING.

Attorney General vs. William Chamberlain *et al.*

Attorney General vs. Hazen S. Pingree *et al.*

State vs. Grand Rapids & Indiana R. R. Co.

State *ex rel.* Attorney General vs. A. P. Cook Co., limited, *et al.*

State vs. Jackson, Lansing & Saginaw Railroad Company.

SCHEDULE E.

This schedule contains a list of all chancery cases commenced, determined or pending, in which some State officer has been made a party, and in which the State has some interest. These cases have been referred to the prosecuting attorneys of the various counties in which they are commenced, and left in their charge:

Edwin Thayer *et al.* vs. Henry Pelgrim *et al.* Bill in chancery. Ottawa county.

Cornelia G. Fitzhugh vs. Auditor General *et al.* Bill in chancery. Bay county.

Jennie E. Warren vs. Auditor General *et al.* Injunction bill. Bay county.

George S. Sutton vs. Auditor General *et al.* Bill in chancery. Bay county.

Horace G. Snover *et al.* vs. Auditor General *et al.* Bill in chancery. Sanilac county.

Morris Michello *et al.* vs. Auditor General *et al.* Bill in chancery. Bay county.

Keweenaw Association, limited, *et al.* vs. Auditor General *et al.* Bill in chancery. Houghton county.

Caroline M. Tibbals vs. Auditor General *et al.* Bill in chancery. Bay county.

In the matter of the petition of the Auditor General for the sale of certain lands for 1889 taxes. Petition to set aside sale and decree. Delta county.

Delia Potter vs. Auditor General *et al.* Injunction bill. Gratiot county.

George P. McQuiston vs. Auditor General *et al.* Injunction bill. Saginaw county.

William J. Guhl vs. Auditor General *et al.* Injunction bill. Saginaw county.

Frederick Lainer vs. Auditor General *et al.* Injunction bill. Saginaw county.

Charles G. Fowler vs. Auditor General *et al.* Injunction bill. Saginaw county.

Lucinda Fuller vs. Auditor General *et al.* Injunction bill. Gratiot county.

John Halfuld vs. Auditor General *et al.* Injunction bill. Gratiot county.

William A. Kroom vs. Auditor General *et al.* Injunction bill. Gratiot county.

Gust Olsen vs. Auditor General *et al.* Injunction bill. Saginaw county.

Frank Burch vs. Auditor General *et al.* Injunction bill. Saginaw county.

Augusta A. Clark vs. Auditor General *et al.* Injunction bill. Gratiot county.

Hugh McQuistion *et al.* vs. Auditor General *et al.* Injunction bill. Gratiot county.

James B. McQuistion vs. Auditor General *et al.* Injunction bill. Saginaw county.

John M. McQuistion vs. Auditor General *et al.* Injunction bill. Saginaw county.

Abby T. Dodge *et al.* vs. Auditor General *et al.* Bill in chancery. Ingham county.

George A. Baker vs. Auditor General *et al.* Bill in chancery. Saginaw county.

William T. Reed vs. Auditor General *et al.* Bill in chancery. Shiawassee county.

Nathan B. Bradley vs. Auditor General *et al.* Bill in chancery. Bay county.

James H. Plummer vs. Auditor General. Bill in chancery. Bay county.

Minnie K. Brown vs. Commissioner of State Land Office. Bill in chancery. Isabella county.

James B. Judson *et al.* vs. Auditor General *et al.* Bill in chancery. Sanilac county.

Samuel C. Tewksbury vs. Auditor General *et al.* Bill in chancery. Sanilac county.

George W. Shirk *et al.* vs. Auditor General *et al.* Bill in chancery. Sanilac county.

Catherine A. Bolton *et al.* vs. Auditor General *et al.* Bill in chancery. Tuscola county.

In the matter of the petition of the Auditor General for the sale of certain lands for 1889 taxes. Petition to set aside sale and decree. Muskegon county.

John Horan vs. Auditor General *et al.* Bill in chancery. Bay county.

In the matter of the petition of the Auditor General for the sale of certain lands for 1890 taxes. Petition to set aside sale and decree. Muskegon county.

In the matter of the petition of the Auditor General for the sale of certain lands for 1887, 1888 and 1889 taxes. Petition to set aside sale and decree. St. Clair county.

In the matter of the petition of the Auditor General for the sale of certain lands for 1887, 1888, 1889, 1890 and 1891. Petition to set aside sale and decree. Grand Traverse county.

William R. Stafford vs. James Michener *et al.* Bill in chancery. Huron county.

William R. Stafford vs. Sterling Nugent. Bill in chancery. Huron county.

In the matter of the petition of the Auditor General for the sale of certain lands for 1890 and 1891 taxes. Petition to set aside sale and decree. Presque Isle county.

In the matter of the petition of the Auditor General for the sale of certain lands for 1891 and 1892 taxes. Petition to set aside sale and decree. Muskegon county.

In the matter of the petition of the Auditor General for the sale of certain lands or 1891 taxes. Petition to set aside sale and decree. Dickinson county.

Sarah McLean *et al.* vs. Auditor General *et al.* Bill in chancery. Bay county.

In the matter of the petition of the Auditor General for the sale of certain lands for 1891 taxes. Petition to set aside sale and decree. Dickinson county.

Robert Fitzhugh vs. Auditor General *et al.* Bill in chancery. Saginaw county.

Anvil Mining Co. vs. Auditor General *et al.* Bill in chancery. Gogebic county.

SCHEDULE F. •

This schedule contains a list of insurance companies whose articles of association, amendments and extensions thereto have been approved by the Attorney General during the fiscal year ending June 30, 1895.

Farmers' Mutual Fire Insurance Company of Presque Isle, Montmorency and Oscoda counties. Charter approved July 10, 1894.

National Protective Benefit Association. Articles approved August 22, 1894.

Farmers' Mutual Fire Insurance Company of Jackson county. Amendments approved December 10, 1894.

Genesee County Farmers' Mutual Fire Insurance Company. Amendments approved December 3, 1894.

Protective Fire Association of Detroit. Charter approved December 19, 1894.

Masonic Mutual Benefit Association of Branch county. Amended articles approved February 12, 1895.

Mutual City and Village Fire Insurance Company of Dowagiac. Amended charter approved February 12, 1895.

Merchants' Mutual Fire Insurance Company of Marshall. Charter approved February 12, 1895.

Farmers' Mutual Fire Insurance Company of Isabella county. Charter approved February 27, 1895.

Home Mutual Fire Insurance Company of Bay, Arenac and Ogemaw counties. Charter approved March 27, 1895.

The Grand Rapids Mutual Life Insurance Company. Amended articles approved April 5, 1895.

Farmers' Mutual Fire Insurance Company of Kent county. Amended charter approved May 2, 1895.

Michigan Farmers' Mutual Fire Insurance Company of St. Clair and Sanilac counties. Articles of association approved May 11, 1895.

Citizens' Mutual Fire Insurance Company of St. Joseph and Branch counties. Charter approved May 23, 1895.

The Grand Rapids Mutual Life Insurance Company. Amendments approved June 4, 1895.

In re CHANDLER.

(Supreme Court of Michigan. May 7, 1895.)

Disbarment of attorney—Procedure.

In disbarment proceedings defendant is entitled to have the evidence examined by the court, so as to receive an authoritative determination of the falsity of the charges.

Disbarment proceedings in the matter of Albert L. Chandler. Dismissed.

Fred A. Maynard, Attorney General, and *Frank H. Watson*, prosecuting attorney, for petitioner. *Wm. M. Kilpatrick* and *G. R. Lyon*, for respondent.

Per curiam. The respondent is an attorney, licensed to practice in this court, and the present proceeding is based on information furnished to the judge of the circuit court for the county of Shiawassee. The nature of the charges are such that the circuit judge could not have done less than to direct an examination into the facts alleged. This has been had. The case was referred to a circuit court commissioner of Shiawassee county to take testimony, and on the coming in of the report the Attorney General states that, after an examination of the case, he is satisfied that the charges are not sustained by the proofs. We have, however, deemed it due both to the court and to Mr. Chandler that the testimony should be examined by the court. The reputation of the attorney for integrity and fidelity to the interests of his client constitutes his capital in business, and where such reputation is assailed it is his right that an authoritative determination of the questions of fact be made by the court.

After a careful examination of the testimony, we are convinced that Mr. Chandler should be fully acquitted of the charges. The proceedings will be dismissed.

SCHEDULE G.

OPINIONS OF THE ATTORNEY GENERAL.

This schedule contains such opinions of the Attorney General as are deemed of general public interest.

Non-support of family—Divorce proceedings—Criminal prosecution.

The question whether a criminal prosecution would lie for non-support of family, after the separation of husband and wife, and the commencement of divorce proceedings, would depend on whether the separation was the fault of the husband. The divorce proceedings would not be a bar to criminal prosecution.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, July 5, 1894.

WM. H. COMPTON, *Prosecuting Attorney, Coldwater, Mich.:*

DEAR SIR—Your favor stating that a man was arrested under the disorderly act for neglecting to support his family; that a motion has been made to dismiss the case on the ground that respondent had commenced divorce proceedings some time before his arrest, which are still pending, and asking my opinion as to whether the trial can be had notwithstanding such divorce proceedings, is received and considered.

Section 1997a 3d Howell's statutes, which is the disorderly act, provides: "That all persons who run away, or threaten to run away, and leave their wives or children a burden on the public; all persons who, being of sufficient ability, refuse or neglect to support their families, or who leave their wives or children a burden on the public * * * shall be deemed disorderly persons."

The question of whether the person could be prosecuted under the above statute depends upon his liability to support his wife. A husband by whose fault his wife is living apart from him can have no advantage from his own wrong, but his duty to support her remains. On the other hand, since the husband's duty to support his wife is conditioned on her not breaking up the cohabitation without his fault or consent, if she abandons him with no justifiable cause, or dwells separate from him without his consent or fault, the law casts on him no duty to support her.

Bishop on Marriage and Divorce, 1st Vol., sections 1215 and 1228.

Hence, if the separation was the fault of the wife, I do not believe a criminal prosecution for non-support could be maintained; but if the

separation was the fault of the husband, his liability to support his wife would continue, and a prosecution under the above statute would lie.

The criminal case must be determined upon the evidence in that case, and while the fact that a civil case had been commenced for a divorce might be used as bearing on the good faith of the respondent, it would not be a bar to a criminal prosecution.

Respectfully,

A. A. ELLIS,

Attorney General.

"Lloyds"—Insurance—Unauthorized insurance.

The concerns known as the "Lloyds" doing the business of fire, life and accident insurance, should not be allowed to do business in this State without first obtaining the usual certificate of authority from the Commissioner of Insurance.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, July 9, 1894.

HON. THERON F. GIDDINGS, *Lansing, Mich.:*

DEAR SIR—Your favor submitting for my consideration and decision the matter relating to the right of certain concerns known and designated as "Lloyds" to do the business of fire, life and accident insurance in this State without first obtaining the certificate of authority from your department, as required by law, is received and considered.

The "Lloyds" disclaim being either an organization, corporation, association, or joint stock company, but assert that they are individual underwriters; that they are associated together for the conduct of the business of insurance, each individual being liable for his proportion of the losses and entitled to a like share of the profits, and that as individuals they are in no sense amenable to the insurance laws of this State.

Act 74 of the laws of 1893, provides: "That it shall be unlawful for any person or persons as agent, solicitor, surveyor, broker, or in any other capacity, to transact or to aid in any manner, directly or indirectly, in transacting or soliciting within this State, any insurance business for any person, persons, firm or copartnership, who are non-residents of this State or for any fire or inland navigation insurance company or association, not incorporated by the laws of this State, or to act for or in behalf of any person or persons, firm or corporation, as agent or broker, or in any other capacity, to procure or assist to procure, a fire or inland marine policy, or policies of insurance, on property situated in this State for any non-resident person, persons, firm or copartnership, or in any company or association without this State, whether incorporated or not, without procuring or receiving from the Commissioner of Insurance the certificate of authority" required by law.

It will not be disputed that a foreign insurance company can do no business here in this State except upon the conditions which our laws impose. But it is not necessary that insurers, whether individuals, companies or associations, though located in other states should be incorporated to authorize them to do business in this State. The business of

insurance in England was formerly transacted mainly, if not entirely, by individuals, partnerships or unincorporated associations, and the same business has been done to some extent in this country in a similar way. The concern under consideration affords a very good illustration. As was said in the case of *People vs. Jones*, 24 Mich., 214-222: "We are aware of no law which prohibits it (insurance business) to be done in this State by parties unincorporated. On the contrary our statutes recognize the fact that it may be done by individuals and by associations unincorporated, but if done here by parties out of the State, they are, like corporations, to comply with certain statute requirements."

There can be no possible question but what the statute above quoted is broad enough in its terms to apply to the "Lloyds" or any other concern of like character. The language is: "Person, persons, firm or copartnership."

Under a statute of Indiana, which only made it unlawful for insurance companies to do business in that state without first obtaining a certificate of authority, the Attorney General of that state gave it as his opinion that insurance concerns doing business on the "Lloyds" plan was subject to the insurance laws of that state. Under a similar statute in Nebraska the Attorney General of that state made a similar holding. In the case of *State ex rel. Attorney General vs. Ackerman et al.*, recently decided by the supreme court of Ohio, it was held that the Guarantee and Accident Lloyds of New York were unlawfully exercising a franchise and were acting as a corporation within the meaning of their *quo warranto* statute, and that they might be ousted from transacting the business of insurance within that state.

In my opinion the "Lloyds" are as much within the provisions of said act 74 as any other class of associations or companies named therein, and before they are allowed to do business within this State they should be required to obtain the proper certificate of authority; and any person found acting as agent of said Lloyds which have not obtained such certificate of authority, should be promptly prosecuted.

Respectfully,

A. A. ELLIS,
Attorney General.

Salaries of probate judges—Date of increase or decrease.

The increase or decrease in the salaries of probate judges occasioned by the change of population, takes effect from the date on which the census is taken, viz.: June 1, 1894.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, July 16, 1894.

HON. BENJAMIN T. HALSTEAD, *Petoskey, Mich.* :

DEAR SIR—Your favor requesting my opinion as to what date the salaries of probate judges will be increased or decreased according to the population of the county, as ascertained and determined by the census just taken, is received and considered.

Section 1, act 155 of the laws of 1893, relative to the salaries of probate judges, provides: "The judges now elected, or to be hereafter elected,

shall each receive an annual salary * * * which shall neither be increased nor diminished during the term for which they shall have been elected, except as changed by the increase or diminution of population of their respective counties. The amount of such salaries shall be based upon and determined by the population of their respective counties as shown by each succeeding national or State census."

Section 4 of the census law, act 178, public acts of 1893, provides: "That the census enumerators shall take the census and statistics required by this act as of date June one, eighteen hundred and ninety-four."

Construing the two acts together, it is my opinion that the change in the salaries of the probate judges of the State, caused by change of the population of their county, would date from the time the statute provides that the census shall be considered taken, namely, June 1, 1894.

Respectfully,

A. A. ELLIS,

Attorney General.

Inquest—Allowance of accounts—Must be had in open court—Definition of "court."

Under the statute providing that the accounts of coroners' expenses in holding inquests shall be allowed by "the circuit court," the circuit judge at chambers has no power to allow such accounts.

A "court" is defined as the circuit judge sitting in the discharge of his duties at the time and in the place prescribed by law, with its regular officers, etc., in attendance.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, July 19, 1894.

HON. D. B. AINGER, *Lansing, Mich.:*

DEAR SIR—Your favor asking my opinion upon the question as to whether accounts against the State for coroners' inquests should be allowed by circuit judges in open court or at chambers, is received and considered.

The language of section 9593 of Howell's statutes with reference to this matter is that the account of such expenses and fees shall be first allowed by the "circuit court for the county."

The important question which naturally presents itself is, what did the legislature mean when they used the term "circuit court?"

Under a statute of Iowa, requiring divorce proceedings to be had in open court, the supreme court of that state, in speaking of the term "court" and giving to it a definition, said: "To give existence to a court, its officers and the time and place of holding it, must be such as prescribed by law. * * * To constitute the circuit court the circuit judge must be in the discharge of judicial duties at the time and in the place prescribed by law for the sitting of that court."

The term "court" has also been defined as the presence of a sufficient number of the members of a body in the government, to which the public administration of justice is delegated, regularly convened in an authorized

place, at an appointed time, engaged in the full and regular performance of its functions.

Wrightman vs. Karner, 20 Ala., 446.
 Brumley vs. State, 20 Ark., 77.

The case of *Eslow vs. Township of Albion*, 27 Mich., 4, was a chancery case which had been put at issue, and the defendants, under act 170 of the laws of 1869, elected to have the case tried in open court. Complainants thereupon made a special application to the circuit judge at chambers, for an order that instead of the trial in open court testimony should be taken before a commissioner in the usual mode. Defendants objected to this order and to the taking of testimony under it, but their objection was overruled, and the order granted. The case proceeded to final decree and was then appealed. The statute referred to provided that the cause should be heard in its course on the calendar by examination of witnesses in open court, "unless the court, on cause shown," should otherwise direct. It was held that the judge had no power to make such an order at chambers.

McDonald vs. Supervisors, 91 Mich., 459, was a case under the *quo warranto* statute (section 8662 of Howell's statutes) which provides: "Informations under this act may be filed by the prosecuting attorney of the proper county on his own relation, or that of any citizen of the county without leave of the court, or by any citizen of the county by special leave of the court." Special leave to file the information was obtained by an application to the circuit judge at chambers. It was held that where by the express terms of a statute, authority is conferred upon the court to make an order, such order must be made by the court when sitting in regular or special session, and it does not extend to and include the judge sitting at chambers.

Act 193 of the laws of 1883, the purposes of which were to prevent preferences among creditors and distribute the debtor's property equally, provided that upon petition, the court in term time or judge in vacation, might proceed summarily to hear parties concerning the solvency of the debtor, and if certain things appeared the court or judge was authorized to appoint a receiver to take possession of all the debtor's property, etc., and have charge and control of the same.

This statute was declared void for the reason that it attempted to confer such judicial powers upon the circuit judge at chambers that it was clearly in conflict with the provision of the constitution vesting the judicial power in one supreme court, in circuit courts, in probate courts, and in justices of the peace.

Risser vs. Hoyt, 53 Mich., 185.

This decision forcibly illustrates with what care the jurisdiction of circuit courts is guarded, and with what strictness the powers of a circuit judge at chambers are construed.

When the legislature used the term "circuit court" in the statute under consideration, it must be deemed to have done so in view of its well understood meaning. I am thoroughly convinced that they did not intend that the power conferred should be exercised by a circuit judge at chambers. It seems to me that no other reasonable or sensible conclu-

sion can be drawn from the language used than that accounts of the character provided for in said statute should be allowed by the court while sitting in regular or special session, and that by no possible construction can it be held to extend to circuit judges sitting at chambers.

Respectfully,

A. A. ELLIS,

Attorney General.

Taxes—Seventy cents charge—When may be added.

The seventy cents per description which the law authorizes the Auditor General to be added to the amount of a delinquent tax to cover the cost of advertising and sale, cannot be added until after the time fixed by the statute for the sale.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, July 20, 1894.

HON. STANLEY W. TURNER, *Auditor General, Lansing, Mich.:*

DEAR SIR—Your favor asking when, in my opinion, payment of the 70 cents per description for advertising and sale of delinquent tax lands, is properly required in the event of the payment of taxes before sale, is received and considered.

Section 59 of act 206, of the public acts of 1893, provides that any person may pay the taxes on any land returned delinquent to the county treasurer "with interest computed thereon from the first day of March next after the same were assessed at the rate of eight per cent per annum, and office charges, with four per cent as a collection fee, to the county treasurer of the county in which the lands are situated, *at any time before they are sold: Provided, That on all descriptions of land on which any of the several taxes remain unpaid at the time prescribed for the sale of such delinquent tax lands, there shall be charged an additional seventy cents to cover the cost of advertising and selling the same.*"

Section 61 provides for filing the petition for the sale of delinquent tax lands, and opposite each description of land is to be placed "the total amount of such taxes, with interest computed thereon to the time fixed for the sale thereon, and a collection fee of four per cent extended separately against each parcel of land, and he shall include with and add to such total amount against each parcel seventy cents for the cost of advertising and other expenses of sale."

Section 89 provides: "To all taxes upaid on the first day of March next after their assessment, there shall be added interest at the rate of eight per centum per annum, and to all taxes returned to the county treasurer there shall also be added a collection fee of four per cent. Such interest and collection fee shall be collected with such taxes and the interest and taxes to be paid to the State, county and township, in proportion to their several rights therein. * * * No other charges shall be added to any taxes voluntarily paid, either to the township treasurer, the county treasurer, or the State Treasurer, except the expense after it accrues under section 59 of this act."

The above are all the provisions of the tax law relating to this matter. The language of section 59 very clearly indicates that it was not intended that the seventy cents charged for cost of advertising should be added to the amount of the tax when it is paid before the time fixed for sale. There is nothing in section 61 which limits the force of section 59. Section 89 is merely cumulative to section 59 so far as it relates to the amount of charges that are to be added to the tax, except that the former section prohibits any other charges being added to taxes voluntarily paid the township, county or State Treasurer, other than the expense accruing under section 59.

It seems to me there can be no question that the seventy cents additional charge to cover the cost of advertising delinquent tax lands cannot be added to the amount of the tax, where such tax is paid at any time before the time prescribed for the sale.

Respectfully,

A. A. ELLIS,
Attorney General.

Marriage licenses—Publication—Suppression by county clerk.

It is the duty of county clerks to furnish reasonable and proper facilities for the inspection and examination of the records of marriage licenses, during the usual business hours, to all persons having occasion to make an examination of them for any lawful purpose, which would include publication in a newspaper.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, July 20, 1894.

D. R. CRAMPTON, *Editor, etc., Monroe, Mich.:*

DEAR SIR—Your favor stating that since the marriage license law went into effect in Michigan, "we have, each week, published those issued by our county clerk. Of late this official has signified his intention of suppressing their publication, and has withheld several," and asking my opinion as to his legal right so to do, is received and considered.

The act relative to marriage licenses is entitled, "An act for the requiring of a civil license in order to marry, and the due registration of the same, and to provide a penalty for the violation of the provisions of the same."

The purpose of this law was to prevent hasty or ill advised marriages, by requiring an application to a public officer which would become a matter of public record, open to the inspection of anyone. It was thought that this would afford a means by which the parents or interested friends of parties contemplating marriage might be informed of their intention, and if there was any legal obstacle or other reason why such marriage should be forestalled, opportunity would be given for such purpose.

Act 205 of the laws of 1889 provides: "That the officers having the custody of any county, city or town records in this State shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, and for making memoranda or transcripts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose."

There is no question in my mind but what the application and the license issued thereon are county records within the meaning of the above statute, and as held in *Burton v. Tuile*, 78 Mich., 363, the legislature intended to assert by said act 205, the right of all citizens in the pursuit of lawful business, to make such examinations of the public records, in public offices, as the necessity of their business might require, subject to such rules and restrictions as are reasonable and proper under the circumstances.

The case of *Schmedding v. May*, 85 Mich., 1, which involved the right of persons to inspect the records and papers in a suit for the purpose of publishing statements in regard thereto, before trial or hearing, or before they become public by proceedings taken in open court, does not in my opinion apply to this question.

It is the duty of county clerks to furnish reasonable and proper facilities for the inspection and examination of the records of marriage licenses, during the usual business hours, to all persons having occasion to make an examination of them for any lawful purpose, which would, of course, include publication in a newspaper.

Respectfully,

A. A. ELLIS,

Attorney General.

School meetings—Adjournment—Notice

Unless there is a rule of the board fixing the time at which its meetings would stand adjourned in case there was no quorum, the board could not adjourn to any certain time under such circumstances.

Failure to give notice to a member of a school board who is absent from the county, will not render invalid the proceedings of the board had without his being present.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE, }
Lansing, July 21, 1894.

D. W. FENTON, M. D., *Director, Reading, Mich.:*

DEAR SIR—Your favor stating that at the regular meeting of the school board of the village of Reading, which occurred July 3, 1894, only two members were present, and they not constituting a quorum, the meeting was adjourned to meet July 6. Notice was given of the adjourned meeting to all the members, except one who was absent in the northern part of the State. At the adjourned meeting three out of the five members of the board were present and proceeded to do all the business which properly might be done prior to the annual district meeting, which was to be held July 9. The principal business to be transacted at this meeting was the hiring, or rather electing, of three teachers for the ensuing year. At the annual district meeting July 9, two new trustees were elected to fill the places of two whose term of office expired at that time, one of whom was one of the members present at the adjourned meeting of July 6. On account of dissatisfaction with the employment of the teachers, the new board is asked to set aside the election or employment by the old board on the ground that the meeting was not legal, because the absent member was not notified, is received and considered. The following questions are submitted:

1. "Was the meeting of July 6 a legal meeting?"
2. "Should the business transacted at that meeting be set aside by the new board?"

The point that the meeting of July 6 was an adjourned *regular* meeting and therefore no notice was necessary, is not good unless there is a rule of the board fixing the time to which a meeting under such circumstances would stand adjourned. Two members of a board of five could, of course, adjourn, but they could not fix a *time* for the adjourned meeting. A motion to adjourn to a specified time, is, according to general parliamentary rules, debatable, and in order to consider and decide a debatable question a quorum must be present. But I think the meeting of July 6 was a valid meeting for another reason.

Notice was regularly given to four members of the board, and a good legal excuse existed for the failure to give notice to the fifth member, namely: He was not in the county and was absent from his home. Three members actually attended and took part in the meeting of the board, and I do not think greater diligence on the part of the board to obtain the attendance of all of its members would be required. The statute makes no provision for substituted service in such cases, and when it is shown that a member is absent from home, and that the notice, if served, would be only an idle ceremony, I do not think it is required.

I must therefore answer your questions as follows:

1. I am of the opinion that the meeting of July 6 was regular.
2. I do not think the business transacted at that meeting could be set aside by the new board.

Respectfully,

A. A. ELLIS,
Attorney General.

State House of Correction at Ionia—Sentences—Felonies and misdemeanors—"Second terms."

A person convicted of a felony may be sentenced to State House of Correction at Ionia for a less period than six months. But persons convicted of misdemeanors must be sentenced for six months or over, before they can be sent to said institution. Persons known to have been previously sentenced to some other prison for a felony, cannot be sentenced to said institution.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, July 21, 1894.

F. M. DOUGLASS, *Clerk State House of Correction, Ionia, Mich.:*

DEAR SIR—Your favor asking my opinion as to whether under section 29, act 118 of the laws of 1893, it is legal to sentence prisoners to the State House of Correction for a term less than six months, and also to sentence second term men to said institution, is received and considered.

Said section 29 provides: "Courts of criminal jurisdiction may sentence to the State House of Correction and Reformatory at Ionia, all male persons over fifteen years of age and not known to have been previously sentenced to a prison for felony, who shall be convicted of any crime except treason or murder in the first degree; and all male persons over

fifteen years of age who shall be convicted of any misdemeanor, where the sentence for such crime or misdemeanor shall not be less than six months."

It will be observed that the statute provides for two classes of prisoners, and with an exception to each class:

1. Persons over fifteen years of age, convicted of any crime except treason or murder in the first degree, unless they have been previously sentenced to some other prison for a felony.

2. Persons over fifteen years of age who shall be convicted of any misdemeanor except where the sentence for such misdemeanor shall be less than six months.

Reading the two clauses of the statute together, it would be my opinion that a party convicted of a felony might be sentenced to said institution for a less period than six months, but if he was convicted of a misdemeanor, in order to sentence him to said institution, his sentence must not be less than six months.

Persons convicted of any crime, except treason or murder in the first degree, might be sentenced to said institution within the limitations referred to, provided it was not known that they had been previously sentenced to some other prison for a felony.

Second term men, so called, known to have been previously sentenced to some other prison for a felony cannot be sentenced to the State House of Correction and Reformatory at Ionia.

Respectfully,

A. A. ELLIS,

Attorney General.

Hawkers and peddlers—Grocery keepers.

A grocery keeper who sends out a man and wagon to buy butter and eggs, and at the same time delivers to his customers such goods as they may chance to need—the goods being put up and weighed and orders taken at the wagon—comes within the terms of hawkers and peddlers, and should be required to pay the State license.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, July 21, 1894.

E. B. HOWARD, *Deputy State Treasurer, Lansing, Mich.:*

DEAR SIR—Your favor referring to me the letters of R. Baker, Esq., of Vicksburg, Michigan, and requesting my opinion thereon, is received and considered.

It appears that Mr. Baker is the owner of a grocery store in the village of Vicksburg, and that he sends out a team and man to buy butter and eggs, and delivers to his customers goods from his store by this means, such as they may chance to need. Where the goods are put up and weighed to suit the demands of the customers does not appear. I shall suppose, at least in this case, that it is done in the wagon, as there is nothing stated to the contrary, and that is the most reasonable hypothesis. Neither does it appear where the orders are taken, nor when or where payments are made.

Section 1263 of Howell's statutes, which is section 22 of the chapter relative to hawkers and peddlers, provides: "No merchant shall be

allowed to peddle, or to employ others to peddle, goods not his own manufacture, without the license in this chapter provided."

Webster defines the word "peddle" as follows: "To go about and sell; to retail by carrying around from customer to customer; to hawk; to retail in small quantities."

Under an ordinance of the city of Macon, which provided that persons retailing fresh meat in the city, whether from stalls, stores, or by peddling the same on the street, should pay a license of fifty dollars, it was held that a butcher whose residence, shop and slaughter pen were all out of the city limits, but who habitually hauled into the city a part of his fresh meat, and from his wagon delivered it to regular customers at their doors in the city, was within the terms of the ordinance, and subject to the payment of the license fee.

Davis & Co. vs. Mayor and Council of Macon, 64 Ga., 128.

I cannot see but what the wagon is made a kind of portable store and moved daily to the door of each customer, and in my opinion merchants who do business of the character above stated, and in the manner assumed, are not exempt from the provisions of the statute, and should be required to pay the license fee, as therein provided.

Respectfully,

A. A. ELLIS,

Attorney General.

Justices of the peace—Vacancies—Failure to file oath and bond—Notice of vacancies—De facto officers.

The office of justice of the peace becomes vacant upon the failure of the officer to give the oath and bond within the time required by law.

It is the duty of a supervisor to give notice to the county clerk of a vacancy in the office of justice of the peace.

A justice of the peace who enters upon the duties of his office before he files his oath and bond, is at least a *de facto* officer, and his official acts would be valid.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, July 24, 1894.

WASHINGTON GARDNER, *Secretary of State, Lansing, Mich.:*

DEAR SIR—Your favor submitting the following questions is duly received:

1. "Whether an election of a justice of the peace for a full term to succeed an expired term enables said justice to fill his office legally, though he may fail to file his bond for any number of days or weeks after the legal limits of such filing?"

2. "If a justice of the peace fails to file his bond as required by law, is the supervisor expected to notify the county clerk that a vacancy exists, or should the county clerk notify the supervisor of such fact?"

3. "The officiating as a justice of the peace though bond was not filed for two or three weeks or months after the 4th of July immediately following the election to office, does it affect the legality of such official's acts?"

In reply I would say:

1. Section 649 of Howell's statutes provides: "Every office shall become vacant, on the happening of either of the following events, before the expiration of the term of such office: * * *

7. "His refusal or neglect to take his oath of office or to give or renew any official bond or to deposit such oath or bond in the manner and within the time prescribed by law."

Section 728 provides: "Every township office, including the office of justice of the peace, shall become vacant, upon the happening of either of the events specified in chapter 15, as creating a vacancy."

Section 649 above quoted, is section 3 of the chapter 15 referred to in said section 728.

Justices of the peace elected to fill a vacancy are required to execute a bond within ten days after notice of their election, and justices elected for a full term are required to execute a bond on or before the 4th day of July next after their election.

Sections 767 and 768 of Howell's statutes,

While it must be conceded to be the general rule that where an officer takes an office by election, his failure to give his official bond within the time prescribed by law does not *ipso facto* render the office vacant, yet it cannot be said that there are no exceptions to this rule.

It will be observed that the statute in question makes a failure to give the bond as strictly a cause of vacancy as the death of the incumbent, his resignation, his removal from office, etc. In other words, it seems to me to have been the plain intention of the legislature, as expressed in this statute, to render any office vacant, including that of justice of the peace, upon the failure of the officer to give his official bond within the time prescribed by the statute.

Kansas had a statute identical in terms with the statute under consideration. The supreme court in construing it said: "There can be no mistake as to the meaning of these statutes. Whatever may be the rule, independent of the statute, the plain provision of the law is, that not only a refusal, but a neglect simply, to deposit the official oath and bond within the time prescribed, vacates the office. We may not add to nor take from the law." *State vs. Matheny*, 7 Kan., 327.

Under a similar statute of Florida the supreme court of that State held that a failure of the officer to qualify within the time prescribed by statute, *ipso facto*, rendered the office vacant.

In re Attorney General, 14 Fla., 277.

Under a statute of California, which was nearly identical with ours, it was held that an office becomes vacant when the person elected thereto fails to file his official bond within the time prescribed by the statute.

People vs. Taylor, 57 Cal., 620.

People vs. Perkins, 85 Cal., 509.

For similar statutes and similar holdings, see:

State vs. Johnson, 100 Ind., 489.

Falconer vs. Shores, 37 Ark., 386.

Thompson vs. Holt, 52 Ala., 491.

Auditors vs. Benoit, 20 Mich., 181.

Our statute is a peculiar one and is not, I believe, to be governed by the general rule, but in its construction I believe the supreme court would adopt the same views expressed in the decisions just referred to, and I am therefore constrained to hold that a failure to give the bond within the time prescribed by the statute would render the office of justice of the peace vacant. If a bond should be presented to the supervisor or county clerk by the justice elect, after the time prescribed in the statute, and it was approved by such officers, and he entered upon the duties of his office, while there would be a considerable question as to whether his title to the office could be successfully attacked.

Smith vs. Cronkhite, 8 Ind., 134.

Chicago vs. Gage, 95 Ill., 593.

Cawley vs. People, 95 Ill., 249.

State vs. Falconer, 44 Ala., 696.

He would, at least, be a *de facto* officer, and his official acts would be valid and binding upon the public.

2. Subdivision 7 of section 649 of Howell's statutes, clearly makes it the duty of the supervisor to give notice of any vacancy in the office of justice of the peace, to the county clerk. He would have knowledge of such vacancy, as the statute requires him to approve the sureties named in the bond of the justice.

Section 768, Howell's statutes.

3. Under the well settled rule that the official acts of a *de facto* officer are valid, if a justice of the peace should enter upon the duties of his office before he filed his official bond, his official acts would be valid, though he might be liable to the penalty specified in section 771 of Howell's statutes.

Respectfully,

A. A. ELLIS,
Attorney General.

Justices of the peace—Excess in townships—Void acts of officers—De facto office—Quo warranto.

Where there are six justices of the peace in the township, elected, qualified and all attempting to perform the duties of said office, two of said justices cannot be considered as even *de facto* officers, and their acts would be absolutely void.

The prosecuting attorney should investigate the facts and require two of the six justices to resign, and, in case of a refusal, should commence *quo warranto* proceedings against them.

There can be no *de facto* office where there is no officer *de jure*.

In this country there can be no such thing as a *de facto* office.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, August 3, 1894. }

HON. JOHN T. RICH, Governor, Lansing, Mich.:

DEAR SIR—Your favor referring to me the communication of J. P. Colvin of Whittemore, Michigan, wherein it is stated that in the township of Burleigh, Iosco county, there are six justices of the peace, all elected and duly qualified, and all attempting to perform the duties of

their several offices, and requesting my opinion thereon, is received and considered.

It is very clear that some of the justices referred to are unlawfully attempting to exercise the duties and functions of an office to which they are not entitled.

Section 17 of article 6 of the constitution provides: "There shall be not exceeding four justices of the peace in each organized township."

The above provision of the constitution expressly negatives the idea that there can be six legal incumbents of the office of justice of the peace in one township. This being true, the acts of the two not entitled to the office cannot be effectual for any purpose.

Carleton vs. People, 10 Mich., 250.

Two of the justices are not even *de facto* officers, as they do not possess even a color of right. It is a very well settled rule that in the very nature of things there can be no officer *de facto* where no officer *de jure* is provided for by law. In this case, where the law has provided for only four justices of the peace, there cannot be two *de facto* justices where six have been elected. It cannot be said that they occupy a *de facto* office, as under a constitutional government like ours there can be no such thing as a *de facto* office.

Norton vs. Shelby Co., 118 U. S., 425.

To avoid any complications which might arise by reason of the acts of such justices being void, it is important that steps be taken at once to determine who are the legal justices of the township. To this end I recommend that you request the prosecuting attorney of Iosco county to at once investigate the matter, and upon reaching a conclusion as to which two of the six justices are illegally assuming to exercise the duties of that office to request of such justices their immediate resignation to the proper authority, and if they should refuse, to file an information in the nature of a *quo warranto* in the circuit court of Iosco county, upon his own relation, as provided in section 8662 of Howell's statute, to test the right of such justices to occupy their said office.

Respectfully,

A. A. ELLIS,

Attorney General.

Warranty deeds—Construction—Estates upon condition—Conditions broken—School-house sites.

A clause in a warranty deed conveying to as school district certain lands for a school-house site which reads "To have and to hold the same for school purposes and no other," does not create an estate upon condition subsequent.

Conditions subsequent in a deed are always construed strictly.

More abandonment of the property without converting it to some other use, would not be a breach of the above condition.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, August 7, 1894. }

F. G. FRIEND, Director, Lake Odessa, Mich.:

DEAR SIR—Your favor enclosing a warranty deed given by Caroline Russell and others to school district No. 1 of the township of Odessa in the county of Ionia, conveying to said district certain lands for a schoolhouse

site, and requesting my opinion as to whether the title to said lands still remains in the district in view of the terms of the deed, and the following condition of affairs, is received and considered.

You state: "Said district now includes the village of Lake Odessa, and the site referred to is off to one side of the village; the school building is brick; two years ago at a special meeting it was voted to close the school-house and rent a room down in the village for school purposes; the seats and stove were removed and the building has been vacant ever since, not used for anything."

It appears from the deed that it was executed on the 22d day of January, 1872, and I take it for granted that the land has been occupied for school purposes ever since, with the exception of the two years above mentioned. The deed is the ordinary short form, and the consideration twenty dollars. Immediately following the description is this clause: "To have and to hold the same for school purposes and no other."

In view of this clause in the deed and the facts above stated, two questions naturally suggest themselves to my mind.

First, Does the language above quoted from the deed create an estate upon condition; and

Second, If it does, has the condition been broken?

If the estate is upon condition, it is subsequent and not precedent, and conditions subsequent, having the effect in case of a breach, to defeat estates already vested, are not favored in law, and hence always receive a strict construction.

Barrie vs. Smith, 47 Mich., 130.

A deed will not be construed to create an estate on condition, unless language is used which according to the rules of law, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated.

Devlin on deeds, section 970.

Nor are conditions to be raised readily by inference or argument.

Rawson vs. School District, 7 Allen, 125.

The language in this deed is not such as is ordinarily used in creating conditional estates, such as "on condition," "provided always," etc. While I should not consider it at all necessary to use these technical terms in order to create such an estate, yet Tiedeman says that if other words are used, it is necessary that the covenant contain a clause of forfeiture, or the reservation of a right of entry upon the breach of the covenant, in order that the breach may work a forfeiture of the estate.

Tiedeman on real property, section 863.

So, in *Shep. Touch.* it is said that, "To every good condition is required an external form."

A case decided by the supreme court of West Virginia seems decisive of this point. It was there held that a grant of land for a consideration to a trustee upon trust that the trustee should at all times permit all the white religious societies of christians and the members of such societies to use the land as a common burying ground and for "no other purpose" was not a grant upon a condition. The circumstances of this case, both as

to the purchase and the form of the deed, are so similar that I cannot better express my views upon this subject than by quoting the language of the court in that case. After discussing several propositions as bearing generally upon the construction that should be given the conveyance, the court proceeded as follows: "Nor do I think the addition of the words, 'and for no other purpose,' to the declaration of the purpose of the grant in the deed, can have the effect of converting what would otherwise be an absolute grant into one that is conditional. It is not words of exclusion that create a conditional estate, but words importing an intention to create such an estate. The grant itself must be conditional and not merely the use limited. In the latter case the restriction can at most operate only as a covenant which the grantee might in a proper case be compelled to perform. But it could not make the estate granted conditional. * * * * The deed contains no intimation that it was made on such condition. There are no apt or proper words to create a condition; there is no clause of reentry or forfeiture. The grant was not voluntary, but for a consideration which was in all probability the full value of the land. The use declared is not for the benefit of the grantor or his heirs or assigns. There can be no doubt of the intent of the grantor that the land should always be used for the purpose declared. This intent is clearly expressed, but there are no words to indicate an intention that if the grantee permitted the land to be used for a different purpose the title should thereupon be forfeited and revert to the grantor or his heirs."

Brown vs. Caldwell, 23 W. Va., 187.

It was said in *Rawson vs. Uxbridge*, 7 Allen, 125, that "There is no authoritative sanction for the doctrine that a deed is to be construed as a grant on condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, when such purpose will not inure specially to the benefit of a grantor and his assigns, but is in its nature public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled."

To the same effect see:

J. M. & I. R. Co. vs. Barbour, 89 Ind., 375.
 Hunt vs. Beeson, 18 Ind., 380.
 Taylor vs. Binford, 37 Ohio St., 262.
 Schier vs. Trinity Church, 109 Mass., 1.
 Thornton vs. Trammell, 39 Ga., 202.
 Ayer vs. Emery, 14 Allen, 67.
 Packard vs. Ames, 16 Gray, 327.
 Stanley vs. Colt, 5 Wall., 119.

The foregoing authorities seem to settle conclusively the point that the clause in this deed does not create an estate upon condition. But even submitting that it does, I am clearly of the opinion that there has been no such breach of the condition as would warrant a reentry by the grantor or his assigns.

Poitevent vs. Supervisors, 58 Miss., 810.
 Carter vs. Branson, 79 Ind., 14.
 Crane vs. Hyde Park, 135 Mass., 147.
 Mills vs. Seminary, 58 Wis., 135.
 Osgood vs. Abbott, 58 Me., 73.
 Taylor vs. Binford, 37 Ohio St., 262.

It follows as a corollary to what I have just said, that the title to said property still remains in the school district, and they have a right to make such a disposition of the schoolhouse or the land on which it stands as in their judgment may seem for the best interests of the district.

Respectfully,

A. A. ELLIS,

Attorney General.

Selection of jurors in the Upper Peninsula—Qualification of jurors.

Jury boards who are, by law, required to select a list of jurors for their respective counties in the Upper Peninsula, must be governed by the general law as to the qualifications of jurors, and must therefore select from persons who are on the assessment rolls for that year.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, August 10, 1894. }

ELMER E. HALSEY, *Prosecuting Attorney, L'Anse, Mich.:*

DEAR SIR—Your favor stating "At the July term of the circuit court for the county of Baraga, a challenge to the array of jurors was interposed for the reason that only ninety-seven names were selected by the board to serve as jurors, and that a part of these were not on the assessment rolls of the different townships; the challenge was sustained and the jury discharged. I have directed the county clerk to request the supervisors of the different townships to bring in their assessment rolls for this year and have the officers who compose the jury board select a list of one hundred names from these rolls to act as jurors for the remainder of the year," and requesting my opinion as to whether the names should be taken from the assessment rolls of this year or from the year previous, is received and considered.

Section 1 of act 142, laws of 1883, provides: "That the county clerk, judge of probate, sheriff and county treasurer of each county in the Upper Peninsula are hereby constituted a board for the purpose of selecting a list of names of persons, annually, to act as petit jurors in the circuit courts in such counties."

Section 2 provides: "Said board shall meet annually in the month of May, at such time and place as they may agree upon, and it shall be their duty to select a list of persons qualified to serve as jurors in courts of record, and file such list with the county clerk. * * * Said board, in selecting and returning the names of persons to be drawn as jurors, shall be controlled by the general laws of this State governing supervisors in selecting jurors, not inconsistent herewith."

Section 7555 of Howell's statutes, relative to the return and summoning of jurors by supervisors, provides: "The said officers shall proceed to select from the person assessed on the assessment roll of the township or ward for the same year, suitable persons, having the qualifications of electors, to serve as jurors."

It is my opinion that the board should follow out the directions of section 7555, Howell's statutes, above referred to, and select from those who are on the assessment roll for the present year. In other words, they

should proceed in all respects the same as though no jury list had been returned.

It seems clear to me from the language of the statute that the returning board should follow particularly the provisions of the statute relative to the *pro rata* number which should be returned from each township in proportion to the number of inhabitants in each township, as appears by the census, as the law provides that all provisions not inconsistent with the special act shall apply.

Respectfully,

A. A. ELLIS,

Attorney General.

Liquor law—Sureties—New bond.

The law does not authorize the county treasurer to require a new liquor bond where a surety is actually worth in real estate less than the statutory penalty of the bond.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, August 14, 1894.

EPHRAIM MARBLE, *County Treasurer, Marshall, Mich.:*

DEAR SIR—Your favor of August 13, stating in substance that a certain party is surety on two liquor bonds, both of which have been duly approved by the common council, and that such party is actually worth in real estate less than two-thirds of the penalty of one of the bonds, and asking whether or not you have authority to order a new bond on proof being filed of the facts in the case, is received and considered.

In reply would say that section 8 of act 513 of the public acts of 1887, leaves the authority to decide upon the sufficiency of the surety to the township board or board of trustees, or common council, and under that act I think their decision in the matter is binding upon you.

The law does not seem to make the suretyship upon another bond an actual indebtedness, and therefore would not bear upon the solvency or insolvency of the surety.

A new bond can only be ordered by you in case of death, insolvency or removal of either of the sureties. The clause in the law giving you authority to act in other contingencies has been held unconstitutional by the supreme court.

It may be a hardship in the case mentioned by you, and injustice may be done the public, still in my opinion the statute furnishes no remedy.

Respectfully,

A. A. ELLIS,

Attorney General.

Hawkers and peddlers—Licenses—Township authorities.

The township authorities of the upper peninsula have the authority to require the payment of a hawkers' and peddlers' license, although a person has had issued to him a State license.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, August 22, 1894. }

HON. E. B. HOWARD, *Deputy State Treasurer, Lansing, Mich.:*

DEAR SIR—Your favor enclosing a letter from M. Feinburg, Esq., of Ironwood, Michigan, from which it appears that Mr. Feinburg and others, who have a hawkers and peddlers' State license, are required by the authorities of unincorporated villages to take out a local license, and requesting my opinion as to the right of such authorities to impose an additional tax upon the peddler who has already complied with the State law, is received and considered.

I must assume that the authorities of unincorporated villages, referred to, are the authorities of the township, as there can be no authorities of an unincorporated village. Such a village forms a part of a township, and is governed by township authorities.

Act 204 of the public acts of 1889 provides: "That the township board of any township in the Upper Peninsula of Michigan may, at any meeting, regular or special, license hawkers, peddlers and pawnbrokers, and hawking and peddling, and may regulate and license the sale or peddling of goods, wares, merchandise, refreshments, or any kind of property or thing, by persons going about from place to place in the township for that purpose, or from any stand, cart, vehicle or other device, in the streets, highways, or in or upon the wharves, docks, open places or spaces, public grounds or public buildings in the township: *Provided*, That in no case such license shall exceed the sum of one hundred dollars for peddling in such township."

This act has not been repealed, and very clearly gives the township authorities the right to require the payment of a hawkers and peddlers' license within certain limitations.

Respectfully,

A. A. ELLIS,
Attorney General.

Legal advertising—Insurance notices—Number of insertions—Statutory construction—Fees.

A notice of revocation of authority published by order of the Commissioner of Insurance in pursuance of law, is a legal notice, and the fees for publishing the same should be allowed at the rate fixed for legal advertising,

A statutory requirement that a notice shall be published "for four weeks," is construed to mean a publication daily for four weeks.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, August 27, 1894. }

HON. BOARD OF STATE AUDITORS, *Lansing, Mich.:*

GENTLEMEN—Your favor enclosing claim of the Detroit Free Press Company for publishing notice of revocation of authority, issued by the Commissioner of Insurance, in pursuance of section 28 of act 136 of the laws of 1869, as amended by subsequent acts, and submitting the question as to whether or not the publication of said notice comes under the head of "legal advertising," for which the party would receive the compensation named in section 9030 of Howell's statutes, is received and considered.

Section 9028 of Howell's statutes provides compensation for publishing certain legal notices, and section 9030 provides "for publishing any other legal notice, or any order, citation, summons, or any other proceedings or advertisement required by law to be published in any newspaper, the cost of publishing such advertisement shall not exceed the rate of seventy cents per folio for the first insertion, and thirty-five cents per folio for each subsequent insertion."

There can be but little question but what the notice under consideration comes under the head of legal advertising. It is an "advertisement required by law to be published in some newspaper," and the fees for publishing such notice should be paid at the rate provided for in section 9030 above mentioned.

Another question arises as to what construction should be placed upon section 28 of act 136 laws of 1869, above referred to. That section provides that under certain conditions it shall be the duty of the Commissioner of Insurance to revoke the certificate of authority granted in behalf of an insurance company, "and shall cause a notification thereof to be published in some paper of general circulation in this State for four weeks." The language of this statute is peculiar. It requires the notice to be published "for four weeks." Similar statutes have been construed to mean a publication once every day for the time named.

Early vs. Doe, 6 How., 610.
Anonymous, 1 Wend., 90.

This seems to have been the interpretation placed upon it by the Commissioner of Insurance, from the fact that he ordered the notice published in a daily paper. At least, under such a statute, unless the Commissioner otherwise specially ordered, I think that in cases where he ordered the notice printed in a daily paper, the paper would be justified in construing his order as meaning a publication once a day for four weeks. This, I believe, was the interpretation placed upon the order of the Commissioner by the Free Press Company, as it appears from the correspondence enclosed that they published the notice daily for four weeks.

It is my opinion that the publication of the notice every day for four weeks was justified under the order of the Commissioner and the statute, and the paper should be allowed pay for the actual number of times that the notice was inserted, at the rate above referred to for legal advertising.

Respectfully,

A. A. ELLIS,
Attorney General.

Schools—Text books—District board.

A district board has power to change text books once in five years without any vote of the district.

If a change is made oftener than every five years, a consenting vote of the district must be first obtained.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, August 28, 1894.

G. T. WAGNER, *Assessor, Chesaning, Mich.:*

DEAR SIR—Your favor stating that your school board have changed text books recently, and adopted the text books of Ginn & Co., of Chicago, the old books in use being those of the American Book Co.; that the power of the board to so change the text books without the consent of the district, is questioned by some members of the district, and requesting my opinion upon the matter, is received and considered.

Section 15 of chapter 3 of the general school law provides: "The district board shall specify the studies to be pursued in the schools of the district. . . * * * Each school board making a selection of text books under the provisions of this act shall make a record thereof in their proceedings, and text books once adopted under the provisions of this act shall not be changed within five years, except by the consent of a majority of the qualified voters of the district present at an annual meeting, or at a special meeting called for that purpose."

You fail to state when the text books of the American Book Company were adopted. Hence, in answer to your question I would say that if the selection of the text books of the American Book Company was made more than five years ago, the district board had the power, without the consent of the district to adopt the text books of Ginn & Co. If, on the other hand, the selection of the text books of the American Book Company was made less than five years ago, it would be necessary to first obtain the consent of a majority of the qualified voters of the district present at an annual or special meeting, before any change in the text books of the district could be made. The power of selecting text books rests entirely with the district board, with the exception that they must first obtain the consent of the district when a change is made oftener than every five years.

Respectfully,

A. A. ELLIS,
Attorney General.

County commissioner of schools—Sale of school apparatus—Construction of statutes—Agents—Bona fide sales.

A county commissioner of schools cannot sell in his own county, school apparatus of his own invention, either directly or through agents. He may sell to third parties other than school officers, if the sale is *bona fide* and in good faith, the commissioner reserving no interest.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
{ Lansing, August 28, 1891. }

HON. H. R. PATTENGILL, *Superintendent of Public Instruction, Lansing, Mich.:*

DEAR SIR—Your favor referring to me the communications of a county commissioner of schools of this State concerning his right to sell in his county a "number device," designed for use in the schools, which was invented by him, is received and considered.

You request my opinion as to the right of such commissioner to sell such device through agents, also his right to sell such device to parties other than school district officers, such parties afterwards selling the device to school officers for the use of the schools.

Section 11 of act 147, public acts of 1891, provides: "No county commissioners shall act as agent for the sale of any school furniture, text books, maps, charts, or other school apparatus, * * * in the county for which he was elected."

The evident purpose of this law is to prohibit county commissioners of schools from exercising their influence as such commissioners, to further the interests of any particular persons or corporations dealing in school supplies. Although a commissioner, selling goods of his own invention and manufacture, may not come strictly within the letter of the above statute, yet I am fully convinced that he is within its meaning. There are much stronger reasons for saying that a commissioner should not be allowed to use his official position to influence the sale of some article of his own invention, than to say that he should not be allowed to use it to influence the sale of some article not his own invention. The evil which the legislature has attempted to remedy by this law would be far more apparent in case of a commissioner selling articles of his own invention or manufacture, than it would in a case of his selling as agent for some other person or corporation. This is a statute designed to protect the public interests, and a construction which will permit parties to practice the very evil aimed at by the legislature, would defeat the evident object of the statute, and should only be adopted when none other is open.

I am thoroughly convinced that the legislature intended, by this statute, to absolutely prohibit county commissioners of schools from trafficking in any manner in goods designed for use in schools, whether of their own manufacture, or as agent for third persons.

It is a well settled rule of statutory construction that what is within the intention of the legislature, yet not within its letter, is within the statute; and what is within the letter, but not within the intention, is not within the statute.

In answer, therefore, to your first proposition, I must give it as my opinion that a county commissioner of schools cannot sell such a device

as referred to through agents or third parties. That would only be doing indirectly what the commissioner is not allowed to do directly. You understand that this only applies to his particular county, as the statute does not prohibit his selling in other counties.

As to your second proposition, concerning the right of the commissioner to sell his invention to third persons other than school officers, said third persons afterwards selling the invention to school officers, I would say that if the sale was *bona fide* and made in good faith, and was absolute, the commissioner reserving no interest of any kind whatever, I see no objection to it. Such a sale would not, in my judgment, violate either the spirit or letter of the statute.

Respectfully,

A. A. ELLIS,
Attorney General.

State Librarian—Exchange of Supreme Court reports.

The State Librarian has the right, under Sec. 7201 of Howell's statutes, to exchange Michigan reports for any law books which have been approved by the chief justice.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE. }
Lansing, August 30, 1894.

MRS. MARY C. SPENCER, *State Librarian, Lansing, Mich.:*

DEAR MADAM—Your request for my opinion as to whether or not you have authority as State Librarian to exchange Michigan Reports for such reports or law books as shall be approved by the Chief Justice of the Supreme Court, for the purpose of obtaining books for the use of the State Library, and stating that Callaghan & Co., of Chicago, who have the contract for publishing the Michigan Reports, object to such exchanges, is received and considered.

Section 7201 of Howell's statutes provides: "The State Librarian may exchange any of said reports for such other reports or law books as shall be approved by the chief justice of the supreme court, which reports or other books, procured by such exchange, shall be kept in the State library."

This section providing for the exchange of reports was in full force and effect when the act of 1879, under which the contract with Callaghan & Co. was let, was passed.

There is nothing in the body or title of the act of 1879 which has any reference whatever to the exchange of books, neither is there anything which in any manner limits or specifies what the Librarian shall do with the books in excess of those especially provided for by section 11 of the act of 1879 (section 7214 of Howell's statutes). It will be observed that the books to be distributed under the above named section embrace a number far less than that directed to be delivered to the State Librarian by section 8 of the same act.

The act of 1879 contains the usual clause repealing all acts or parts of acts contravening the provisions of said act; but it will be observed that there is no clause in the act of 1879 which in any way refers to the exchange of books.

I have examined the contract with Callaghan & Co., and I find nothing in the contract which in any manner limits the right of the State Librarian to use the 350 copies delivered to her in the manner provided by law.

I am of the opinion that section 7201 of Howell's statutes is in full force and effect, and that you as State Librarian have a legal right to exchange any reports of the supreme court of the State of Michigan for such law books or other reports as shall be approved by the chief justice of the supreme court, for the purposes named in said section.

Respectfully,

A. A. ELLIS,

Attorney General.

Tax sales—State tax lands—Voidable sales.

A sale by the county treasurer from the State tax land list, without requiring the purchaser at the same time to pay all delinquent taxes returned against the land, although in contravention of sec. 80 of the tax law, would not be absolutely void, but voidable only, at the option of the Auditor General.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, August 30, 1894.

HON. STANLEY W. TURNER, *Auditor General, Lansing, Mich.:*

DEAR SIR—Your favor submitting the following statement: "A description of land is held by the State as State tax land. Against said land there is also returned certain delinquent taxes. The county treasurer, in selling said land, sells it from the State tax land list only, without requiring the purchaser at the same time to pay the amount of delinquent taxes charged against it," and requesting my opinion as to whether, under section 80, act 206, laws of 1893, such sale is absolutely void, or only voidable, is received and considered.

Said section 80 provides: "In all cases where a description of land is offered as State or county tax land, and the same description or any part thereof shall be offered in the list of lands delinquent for taxes, as provided in this act, the county treasurer shall inform the person bidding for the same of that fact, and such person shall be required to purchase said description at the same time, and if he refuses so to do, the treasurer shall refuse his bid, and shall again offer it as if no bid had been made thereon."

It will be observed that the above section contains no provision expressly declaring that a sale made in contravention of its requirements shall be void. Where sale is made for delinquent taxes, under section 70, it is expressly provided that the purchaser must also buy all State bids, and "all sales made in contravention of this requirement shall be void."

It will be readily seen that a sale from the delinquent list, without selling the land on the State tax land list, would cut off the rights of the State, and hence, in construing that section, I hold that the provisions of that section were mandatory; but in this case the same result would not follow. (See Attorney General's report, 1894, page 145.)

While it cannot be doubted that it is the duty of the treasurer in selling a description of land from the State tax land list to also require the

purchaser to pay all delinquent taxes that may be returned against such description, yet as a failure so to do would not in any manner endanger the public interests, or render the lien of the State for such delinquent taxes less secure, I do not believe it should be held that a sale made in contravention of this statute should be held absolutely void.

It has been held even under a statute declaring a purchase or sale null and void, that if the object of the statute is not to protect public interests, the language is construed as directory merely.

Beecher vs. Marq. & Pac. R. M. Co., 45 Mich., 193.

Green vs. Kent, 13 Mass., 515.

Rex vs. Hipswell, 8 B. & C., 466.

State vs. Richmond, 22 N. H., 232.

I am therefore of the opinion that the language used should be construed as directory, and that a sale made by a county treasurer in disregard of the statute would not be absolutely void, but would be voidable only, at the option of the Auditor General.

Respectfully,

A. A. ELLIS,

Attorney General.

Escheats—Choses in action—Statute of limitations—State.

Where a man dies seized of nothing but choses in action, if the State acquires any right by way of escheat it must institute proper proceedings within six years from the time such right of action accrued, or it will be barred by the statute of limitations.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, September 4, 1894.

HON. JOHN T. RICH, *Governor, Lansing, Mich.:*

DEAR SIR—Your favor enclosing the communications of Elias Hewitt, of Marshall, Michigan, concerning the question as to whether certain property in Calhoun county has escheated to the State, together with the report of John C. Patterson, Esq., of the same place, is received and considered.

It appears from such report that in 1846 Abram Banberg sold and conveyed the east half of the southeast one-quarter of section 9, town 3 south, of range 6 west, to John Houston, Jr., that the said Houston took possession of the land at once, improved it, and he and his grantees have ever since been in open, peaceable and undisputed possession; that in part payment of said land, the said Banberg took two notes for \$133.33 each, one due January 1, 1849, and the other due January 1, 1850; that soon after these notes were given, Banberg went to California, leaving said notes with one David Aldrich, to be kept until called for; that said Aldrich has since died and that the notes are in the possession of his administratrix; that on the back of one of said notes is an endorsement of one hundred dollars, made in November, 1850, or 1851; that the principal maker of the note is responsible and lives in Marshall; that said Banberg has never returned to this State, and is supposed to be dead. It further appears from the letter of Mr. Hewitt, enclosed, that said Banberg died in California, leaving no heirs at law.

The only property which could possibly be said to have escheated to the State, is the right of action upon these notes. Without considering the question as to whether personal property can escheat to the State, it seems beyond all question that there can be no such thing as an escheat in this case. The right of action accrued upon the last of these notes in 1850, and if nothing prevented, the action should have been brought within six years from the time the last note matured. It does not appear that the maker of the note was out of the State, or that any legal reason existed why he could not have then been sued. Neither does it appear when Banberg died, and so far as anything contained in the statement of facts is concerned, he might have lived until long after the notes were outlawed. If the State gained any right by reason of the death of Banberg, then the State would at least be required to bring an action before the notes were barred by the statute of limitations, as the statute runs against the State, the same as against an individual.

State vs. Dunbar, 57 N. W. Rep., 1103.

The State, in order to recover would have to prove the death of the original holder of the notes without heirs. Then it would have to bring its action before the notes were barred by the statute of limitations, and then there would be some question as to whether or not the personal property would not follow the residence of Banberg, so that whatever rights there were in the personal property would not go to the State of California, if Banberg resided in that State at the time of his death.

The claim is too stale and uncertain to demand any attention on the part of the State authorities.

Respectfully,

A. A. ELLIS,
Attorney General.

Sheriff's fees.

Where a sheriff on the same warrant arrests more than one person, he would only be entitled to his actual travel going and coming.

Where an arrest is made each officer necessarily engaged therein, would be entitled to his actual travel in coming and going.

A sheriff is only entitled to turnkey and court fees for the first reception of prisoner and his final discharge.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, September 7, 1894.

C. M. KING, *Sheriff, Stanton, Mich.:*

DEAR SIR—Your favor of September 3 received, submitting to me four questions, viz.:

"1. What fees am I entitled to for serving warrants, whether ten cents per mile going and coming only, or ten cents per mile for each prisoner (where more than one)?

"2. What fees are officers entitled to for returning with prisoner?

"3. Am I entitled to turnkey fees and court fees each time a prisoner is removed from the jail to the court room during his trial, when such removal is by order of the court?

"4. Am I entitled to two turnkey fees when a man is brought here and held two or three days for trial in justice court?"

In reply to your first question would say that the fees to which a sheriff is entitled for arresting more than one person at the same time would depend upon the question as to whether or not he made the arrest on more than one warrant.

Section 9054 of Howell's statutes limits the fee to the fact of serving a warrant.

If a sheriff on the same warrant arrests more than one person, he would only be entitled to his actual travel going and returning.

In reply to your second question. Each officer necessarily engaged in the arrest of one or more persons would be entitled to his actual travel in going and coming, where an arrest is made.

In reply to your third question I would say that you are not entitled to thirty-five cents for every time a prisoner is taken to court and brought back. That clause in the statute only covers the first reception of the prisoner and his final discharge, and does not relate to the removal from the jail to the court and return during the time he is being detained by you for trial or examination.

Lee vs. Board of Supervisors of Ionia County, 68 Mich., 330.

You would, of course, be entitled to fifteen cents for taking the prisoner before the court each time he was removed from jail and taken before the court.

In reply to your fourth question. If you mean to ask if you are entitled to a turnkey fee for receiving and releasing persons who are detained for trial in justice court, I would say that you are; that is, you are entitled to charge thirty-five cents for each prisoner committed to jail, and thirty-five cents for each person discharged from jail, whether he is detained for trial in justice court or in any other court; but such charge only relates to the beginning and end of the term of imprisonment.

Respectfully,

A. A. ELLIS,

Attorney General.

Certificate of payment of taxes—Undivided interests.

Where a party owns an undivided interest in land and he sells such interest to a third party, he is entitled to a certificate from the county treasurer as to the payment of taxes on such undivided interest, regardless of whether the taxes on the remaining interest have been paid or not.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, September 8, 1894.

GEORGE L. CORNVILLE, *Register of Deeds, Tawas City, Mich.:*

DEAR SIR—Your favor of September 6, submitting to me the following proposition, is received:

"A owns an undivided one-half interest in certain lands, and has paid his taxes; B owns the other undivided one-half interest, and has not paid his taxes; A sells and deeds to C his interest; C presents the deed to the

county treasurer for his certificate to enable him to record his deed. Can C compel the treasurer to issue the certificate while B's taxes are unpaid?"

Section 135 of act 206 of the public acts of 1893, provides for a certificate from the county treasurer or Auditor General that the taxes have been paid on "such piece or description of land to be conveyed by such instrument." The description of land contained in the deed referred to in your question would be the undivided one-half, etc., and as A has paid the taxes upon the undivided one-half, a certificate to that effect from the county treasurer or Auditor General would be all that the register would be legally authorized to require.

The law expressly provides that any person owning any part or interest in any land may pay the taxes upon that part or interest, and it necessarily follows that when a piece of land can be divided into several parts or interests, a certificate that the taxes are paid on such part or interest, would authorize the register of deeds to record a deed of such part or interest.

Respectfully,

A. A. ELLIS,
Attorney General.

Notary public—Vacancy—Removal from county—Appointment of member of legislature to office—Appointment of circuit judge.

Where a notary public removes from the county for which he was appointed, his office becomes vacant.

A member of the legislature cannot be appointed notary public during the term for which he is elected.

A circuit judge cannot be appointed notary public during the term for which he is elected and for one year thereafter.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE, }
Lansing, September 15, 1894.

HON. JOHN T. RICH, *Governor, Lansing, Mich.:*

DEAR SIR—Your favor requesting my opinion upon the following questions is received:

"1. Does removal from the county in which appointed vacate the office of notary public?"

"2. Can a member of the State Legislature be appointed to the office of notary public during the term for which he is elected?"

"3. Can a circuit judge legally be appointed to, or hold, the office of notary public?"

1. Section 636 of Howell's statutes provides: "Notaries public shall reside in the county for which they are appointed, but they may act as such notaries in any part of this State."

Section 649 of Howell's statutes provides: "Every office shall become vacant, on the happening of either of the following events, before the expiration of the term of such office. * * *

"4. His ceasing to be an inhabitant of this State; or, if the office be local, of the district, county, township, city or village, for which he shall have been elected or appointed, or within which the duties of his office are required to be discharged."

The office of notary public is a local one, and under the above provisions of the statutes of this State, a removal from the county for which the officer was appointed, necessarily creates a vacancy. The law is open to no other interpretation.

"2. Section 18, article 4., of the constitution provides: "No person elected a member of the legislature shall receive any civil appointment within this State * * * from the Governor * * * during the term for which he is elected. All such appointments * * * shall be void."

Notaries public are appointed by the Governor, and it seems unnecessary to say that under the plain provisions of the constitution a member of the legislature cannot hold such office or be appointed thereto during the term for which he was elected. This prohibition extends during the term and a resignation by the member will not relieve the disability.

Ellis vs. Lennon, 86 Mich., 463.

3. Section 9, of article 6, of the constitution provides: "Each of the judges of the circuit courts shall receive a salary payable quarterly. They shall be ineligible to any other than a judicial office during the term for which they are elected, and for one year thereafter."

The office of notary public is not a judicial office, and it is plain from the above provision of the constitution that a circuit judge cannot hold any ministerial office, such as notary public, during the term for which he is elected and for one year thereafter.

Respectfully,

A. A. ELLIS,
Attorney General.

Complaints—Information and belief—Negative allegations—Surplusage—Liquor law.

A criminal complaint cannot be based on information and belief.

A complaint charging the keeping open of a "saloon or bar" contrary to law, need not allege that the saloon or bar was not a drug store.

Where a complaint charges the keeping open of a "place" for the sale of liquors, contrary to law, the exception in the statute as to drug stores must be pleaded.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, September 26, 1894. }

WILLIAM H. COMPTON, *Prosecuting Attorney, Coldwater, Mich.:*

DEAR SIR—Your favor enclosing three criminal complaints, and requesting my opinion as to their sufficiency, is received and considered.

One of said complaints alleges that "On the 4th day of July, 1894, at the city of Coldwater, in the county aforesaid, Smith G. Roy and Edward F. Roy, as he (the complainant) has good reason to believe and does believe, being then and there keepers of a place in the Arlington hotel in said city of Coldwater in the county aforesaid, and the same being a place where spirituous and malt liquors are sold at retail, and the said 4th day of July, 1894, being a legal holiday, did not keep the said place closed," etc., etc.

Another of the complaints follows the above language except that the defendant is charged with "being then and there a keeper of a bar in the Southern Michigan hotel in said city of Coldwater."

The third complaint alleges that "on the 8th day of July, 1894, at the village of Bronson, in the county aforesaid, Michael Dorn, being then and there the keeper of a saloon in the village of Bronson in the county aforesaid, the same being a place where spirituous and malt liquors are kept for sale and sold at retail, and the said 8th day of July being the first day of the week, commonly called Sunday, did not keep the said saloon closed," etc., etc.

The negative allegations in each complaint are "and the said — not being then and there a druggist, nor a person whose business consists in whole or in part of the sale of drugs and medicines, nor a person who sells liquors for chemical, scientific, medicinal, mechanical and sacramental purposes only."

The complaints are drawn under section 17, act 313, of the public acts of 1887, which provides: "All saloons, restaurants, bars, in taverns or elsewhere, and all other places, except drug stores, where any of the liquors mentioned in this act are sold, or kept for sale, either at wholesale or retail, shall be closed on the first day of the week commonly called Sunday, on all election days, on all legal holidays," etc.

1. The negative allegations in all of the complaints are improper. They follow a clause in the statute which has no reference to prosecutions under section 17. The negative allegations in such cases should be "the said place not being a drug store." But as it is alleged in one of the complaints that the defendant did not keep his "saloon" closed, and in another that he did not keep his "bar" closed, I am of the opinion that so far as that question is concerned these two complaints would be valid, as the negative allegation could be rejected as mere surplusage and the complaints still be adequate in law. The name in such case distinguishes the place, and it would seem unnecessary, although it would perhaps be proper, to allege that the said bar or saloon was not a drug store.

People vs. Robbins, 70 Mich., 130.

People vs. Sullivan, 83 Mich., 355.

Where it is charged that a "saloon" is kept open contrary to law, or a "bar," as the case may be, the charge would have no reference whatever to a drug store. Such places have well defined meanings in our law and could never be construed as including drug stores. But where it is alleged that a "place" for the sale of liquors is kept open contrary to law, without describing it either as a saloon or a bar it is necessary to plead the negative clause in the statute.

The case of *People vs. Hass*, 79 Mich., 449, to which you refer, has no application to complaints of this character as the prosecution in that case was under a different section in the law relative to the non-payment of the tax.

People vs. Wheeler, 96 Mich., 1.

2. The complaints against Floyd N. Perkins and Smith G. Roy and another are based upon information and belief, which fact renders them fatally defective. A similar complaint was sustained in *People vs. Bau-*

mann, 52 Mich., 584, but the case was not a well considered one, and I am convinced would not be followed if the question should again be presented to the court. In fact, it was indirectly if not directly overruled in the case of *People vs. Heffron*, 53 Mich., 527. The complaint in that case charged a violation of the liquor law and was based upon the information and belief of the complainant. Justice Champlin, in discussing its validity, said: "The complaint must set up the facts constituting the offense on the *knowledge* of the person making the complaint, and if he does not know them, other witnesses must be examined who do know them; and no person can be arrested on the mere belief of the person making the complaint. The liberty of the citizen is not held upon so slender a tenure as that."

In the matter of Morton, 10 Mich., 208.
People vs. McAllister, 19 Mich., 215.
Hackett vs. Wayne Circuit Judge, 36 Mich., 334.
Sheridan vs. Briggs, 53 Mich., 569.
 Attorney General's Report, 1893, p. 161.

For the reasons above stated, I am of the opinion that the complaint against Michael Dorn, although somewhat irregular, is sufficient, but that the two complaints against Floyd Perkins and Smith G. Roy and another are insufficient and void.

Respectfully,

A. A. ELLIS,
Attorney General.

Justices of the peace—Term of office—Holding over—Township board.

Under section 744 of Howell's statutes, which provides that two justices of the peace, whose term of office will soonest expire, together with certain other officers, shall constitute the township board. A justice of the peace whose regular term has expired and he continues to hold over by reason of his successor failing to qualify is not entitled to act as a member of the board.

STATE OF MICHIGAN, }
 ATTORNEY GENERAL'S OFFICE, }
 Lansing, October 3, 1894.

CHARLES D. BARGHOORN, *Prosecuting Attorney, Luther, Mich.:*

DEAR SIR—Your favor stating that in the township of Dover, Lake county, a justice of the peace elected at the last spring election failed to qualify, and requesting my opinion as to whether his predecessor, who holds over, would have the right to remain on the township board, or whether the justice who would have taken his seat on the board, if the justice who was elected last spring had qualified, would be entitled to a seat as a member of the board, is received and considered.

Section 744 of Howell's statutes, provides: "The supervisors, the two justices of the peace whose term of office will soonest expire, and the township clerk, shall constitute the township board."

The question is, what did the legislature mean when they used the clause in the above statute "whose term of office will soonest expire."

Subdivision 1, section 2, Howell's statutes, provides: "All words and phrases shall be construed and understood according to the common and approved usage of the language."

"Term of office," says McGrath, J., "has a clear and well defined meaning."

Attorney General vs. Lennon, 86 Mich., 468-74.

In that case it was held that the term was fixed by the charter, and no act on the part of the respondent could affect it.

Although the constitution provides that a justice of the peace shall hold his office for four years and until his successor is elected and qualified, yet this provision must be construed, with reference to the term of office, the same as the statute.

The word "term" when used in reference to the tenure of office means ordinarily a fixed and definite time.

Baker vs. Kirk, 33 Ind., 517.

Speed vs. Crawford, 3 Metc. (Ky.), 207.

Mechem's Public Offices and Officers, sec. 385.

Gibbs vs. Morgan, 39 N. J. Eq., 126.

The legislature must be presumed to have used it in the above statute in the common and legal acceptation of the term.

I am of the opinion, therefore, that a justice of the peace who holds over by reason of his successor failing to qualify cannot act as a member of the township board.

Respectfully,

A. A. ELLIS,

Attorney General.

Violation of village ordinances—Jury trials—Criminal cases.

Violations of village ordinances are not criminal offenses within the meaning of the constitution, and the right of trial by jury does not extend to such cases.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, October 3, 1894.

G. H. POST, *Trustee, Fennville, Mich.:*

DEAR SIR—Yours of recent date, submitting the following statement of facts: "A party was tried and convicted in justice court by a jury for riding his bicycle on the sidewalks of this village contrary to an ordinance theretofore adopted by the common council; that he was fined ten cents and costs, which costs included the jury fee; that the party is now attempting to recover the jury fee paid by him from the village and requesting my opinion as to whether the village in prosecuting a person for violating such ordinances is liable for the jury fee," is received and considered.

The village of Fennville is incorporated under the general law for the incorporation of villages and the provisions of sections 2833 to 2846 of Howell's statutes would therefore be applicable to this case.

Section 2834 empowers the council to impose a fine and imprisonment, or both, together with costs of prosecution, for a violation of its ordinances.

Section 2838 authorizes a justice of the peace to try all cases of violation of village ordinances.

Section 2839 provides that such prosecutions may be commenced by warrant for the arrest of the offender the warrant to run in the name of the people of the State of Michigan, and the proceedings to conform as near as may be to proceedings in criminal causes cognizable by justices of the peace.

Section 2841 provides that either party, the people or the defendant, may require a trial by jury.

The question of the liability of the village in this case depends upon whether the proceeding is a criminal prosecution, and such as would give the defendant a constitutional right of trial by jury.

If the defendant had such a right, then the expense thereof would seem to be no legitimate part of the costs in the case.

People vs. Kennedy, 58 Mich., 373.

Violations of village ordinances of the character of the one under consideration are not considered criminal offenses.

People vs. Jackson, 8 Mich., 110.
Wayne County vs. Detroit, 17 Mich., 390.
People vs. Controller of Detroit, 18 Mich., 445.
Fennell vs. Bay City, 36 Mich., 185.
Mixer vs. Supervisors, 26 Mich., 421.
People vs. Cooper, 41 Mich., 403.
Vicksburgh vs. Briggs, 85 Mich., 508.
Floyd vs. Commissioners, 14 Ga., 354.
Williams vs. Augusta, 4 Ga., 509.

Neither does the right of trial by jury obtain in such a case. The provisions in our State and federal constitutions securing the right of trial by jury in criminal cases must be interpreted in the light of principles, which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury.

Callan vs. Wilson, 127 U. S., 540.
McGear vs. Woodruff, 33 N. J., 213.
Williams vs. Augusta, 4 Ga., 509.
Trigally vs. Memphis, 6 Coldw., 382.

Prior to the adoption of our federal and State constitutions, convictions before magistrates for petty criminal offenses, and violations of police regulations were of frequent occurrence, and were recognized as a part of the settled law of England.

Floyd vs. Commissioners, 14 Ga., 354.
McGear vs. Woodruff, 33 N. J., 213.

Dillon in his work on municipal corporations, section 433, says: "Violations of municipal by-laws proper, such as fall within the description of municipal police regulations, as for example those concerning markets, streets, water works, city officers, etc., and which relate to acts and omissions that are not embraced in the general criminal legislation of

the State, the legislature may authorize to be prosecuted in a summary manner, and need not provide for a trial by jury. Such acts and omissions are not crimes or misdemeanors to which the constitutional right of trial by jury extends."

This language was quoted approvingly in *Callan vs. Wilson*, above cited, and would seem conclusive of the point. But the following cases are further cited in support of the proposition, and in my judgment settle the matter beyond all doubt.

Williams vs. City of Augusta, 4 Ga., 509.
 Floyd vs. Commissioners, 14 Ga., 354.
 Hill vs. Dalton, 72 Ga., 314.
 State vs. Glenn, 54 Md., 572.
 State vs. Gutierrez, 15 La. Ann., 190.
 People vs. Justices, 74 N. Y., 406.
 Byers vs. Commonwealth, 42 Pa. St., 89.
 Ex Parte Schmidt, 24 S. C., 363.
 State vs. Powell, 97 N. C., 417.
 Tims vs. State, 26 Ala., 165.
 City of Emporia vs. Volmer, 12 Kan., 622.

In reply to your question, therefore, I would say that if the defendant required a jury trial and advanced the fees therefor, he having failed in the action, he could not recover them back from the village.

Respectfully submitted,

A. A. ELLIS,

Attorney General.

County school examiners—School officers—Statutory construction—Selling books and school apparatus.

The term "school officer," as used in the general school law, includes county school examiners, and such officers have no right to act as agent for school books or school apparatus.

STATE OF MICHIGAN, }
 ATTORNEY GENERAL'S OFFICE, }
 Lansing, October 4, 1894.

HON. H. R. PATTENGILL, *Superintendent of Public Instruction, Lansing, Mich.:*

DEAR SIR—In reference to your request for my opinion as to the right of county school examiners to act as agents for the sale of school books and school apparatus, etc., I would say:

Section 9, chapter 13, of the general school laws of 1893, provides "No school officer, superintendent, or teacher of schools, shall act as agent for any author, publisher, or seller of school books, or shall directly or indirectly receive any gift or reward for his influence in recommending the purchase or use of any library or school book or school apparatus, or furniture whatever, nor shall any school officer be personally interested in any way whatever in any contract with the district in which he may hold office."

The section quoted formed a part of the revision in 1881. (Laws of 1881, p. 198.)

The question presented in this case, as I understand it, is whether the term "school officer" as used in the statute applies to county school examiners.

In this case, as in every other, the intention of the legislature must be ascertained if possible, and effect given it accordingly. And a review, therefore, of the legislation upon this particular question becomes important in ascertaining what that intention was.

The first provision of this kind appearing in the general laws governing primary schools is found in section 13, act 55, laws of 1867. That law provided for the election of a county superintendent of schools by the people, and repealed the provisions of chapter 78 of the compiled laws of 1857, relative to the examination of teachers and the visiting of schools by township school inspectors.

Prior to the general revision of 1881, the only prohibition as to dealing in school books was in the act above referred to relative to county superintendents. The revision of 1881 repealed the act of 1867, and provided for the election of three school examiners by the school inspectors of the several townships, thereby abolishing the office of county superintendent of schools. It also appears from a comparison of the two sections that the revision of 1881 adopted the section in the act of 1867, relative to dealing in school books, and made it a part of chapter 13. But in doing so, the legislature changed the clause, "No county superintendent shall act as agent," etc., so as to read "No school officer, superintendent, or teacher of schools, shall act as agent," etc., thereby enlarging its provisions to a considerable degree.

As above stated, the general revision of 1881 provided for the election, by school inspectors, of three county examiners. This formed chapter 12 of the revision, the one preceding the chapter relative to penalties and liabilities. I mention this as showing that the office of county examiner was created at the same time, and as a part of the same law, that the provision relative to school officers acting as agents for school books, etc., was enacted.

Act 147 of the laws of 1891 provides for the election of a county commissioner of schools by the people, the same as under the county superintendent act of 1867, and also provides that the county examiners shall be elected by the board of supervisors, thus changing the manner of electing county examiners. In other respects the law remains substantially the same as under the revision of 1881. In section 11 of said act 147 it is provided that the county commissioner of schools shall not act as agent for any school books, etc. This of course could not apply to examiners named in the act, and the fact that examiners were not mentioned might lend some force to the idea that the legislature intended that the privilege of selling school books should be extended to that class of officers, but I think the statute does not sufficiently evidence such an intention. The act of 1891 only repeals acts or parts of acts conflicting with its provisions. The provisions of section 11 of that act are not in conflict with section 9 of chapter 13 of the school laws, but only cumulative or supplementary to it, and do not, in my opinion, render the provisions of the last named statute any less applicable to the office of county examiner than they were before the law of 1891 was passed.

A county school examiner is essentially a school officer. His duties are connected with the public schools of his county, and form a part of our

school system. When the legislature said school officer, I believe they intended to include every officer connected with and forming a part of our school system, whether county, township or district, otherwise it is evident that there is no language broad enough to include all classes of school officers.

* Reviewing the legislation that has been had upon this question, and taking into consideration the broad language of the statute, and the evil sought to be remedied, I am led irresistibly to the conclusion that the statute in question applies to county examiners, and such officers would have no legal right to act as agent for any school books or school apparatus contrary to its provisions.

Respectfully submitted,

A. A. ELLIS,

Attorney General.

Hawkers and peddlers—Constitutional law.

A farmer who raises his own stock and butchers them and sells through the country is not liable to the payment of the tax. But if he buys simply for the purpose of butchering and selling, he is no more exempt than any other butcher.

The hawkers and peddlers law so called, imposes a specific tax on such business, and is not unconstitutional as being in restraint of trade.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, October 15, 1894. }

HON. E. B. HOWARD, *Deputy State Treasurer, Lansing, Mich.:*

DEAR SIR—You request my opinion as to the right of individuals to peddle fresh meat in this State from place to place, without first obtaining a hawkers' and peddlers' license, as required by sections 1257 to 1266 of Howell's statutes.

It appears from communications referred to me by you that the particular individual in question resides upon a farm, raises his own cattle, butchers them on his said farm, and during certain seasons of the year runs a meat wagon in the country, selling meat by retail to farmers and other persons living outside of the villages. It also appears that such individual occasionally purchases live stock from third parties, and then butchers and sells them in the manner stated.

First, It is claimed by the person referred to that the statute does not apply to his case; and

Second, That the law is void as being in restraint of trade.

1. Section 1263 of Howell's statutes, which is a part of the law relative to hawkers and peddlers, provides that the act shall not be construed as preventing any farmer from selling his work or production by sample or otherwise, without license. The live stock raised upon a farm, such as cattle, are as much the production of a farmer's labor as the crops which he grows. Butchering them simply converts the article into a marketable condition, and would not, in my opinion, affect his right to sell without license. Hence, as to such cattle, his right to sell them would not depend upon the issuing of a license. But, on the other hand, where he purchases live stock, simply for the purpose of immediate butchering, and

selling, as above stated, he would be required to pay the tax and obtain a license, the same as any other person engaged in a like business. In such case, it would not be anything of his work or production, but that of some one else, and he would necessarily be placed on the same basis with regular butchers and liable to the payment of the tax.

2. I do not believe the law is void on the ground that it is in restraint of trade. Such a proposition is not borne out either by the decisions of our own court or that of any other. Legislation of this character has been universally sustained.

The charge imposed by this statute is a specific tax upon the privilege of carrying on the business of hawking and peddling.

Cooley on Taxation, p. 175.

Section 1259 provides that before a person shall be allowed a hawkers and peddlers' license, he shall pay into the State treasury, the following "duties:" A "duty" is an arbitrary tax or burden imposed upon an occupation or article of commerce, for the purpose of raising revenue. Of the power of the State to impose such a tax, there can be no question.

Cooley on Taxation, pp. 384-390.

Similar statutes have been upheld by our own court.

Wolcott vs. People, 17 Mich., 68.

Kitson vs. Ann Arbor, 26 Mich., 324.

Youngblood vs. Sexton, 32 Mich., 406.

The law in question formed a part of chapter 21 of the revised statutes of 1846, relative to specific taxes. It occupied that position in the law when the present constitution was adopted in 1850. Section 10 of article 14 of such constitution, provides: "The State may continue to collect all specific taxes accruing to the treasury under existing laws." As appears from section 1259, above referred to, this tax has always been paid directly into the State treasury, and was one of the specific taxes which was collected at the time the constitution of 1850 was adopted.

We have, therefore, not only judicial authority in support of the law, but we have an express constitutional provision, authorizing the levy and collection of the tax imposed by it.

I am aware that it has been held in *Chaddock vs. Day*, 75 Mich., 527, that where a license fee was imposed by a municipal corporation, which was so excessive as to amount practically to a prohibition, it was void, as in restraint of trade; but that case, in my opinion, has no application to the hawkers and peddlers' statute. The difference between a local license and a specific tax is quite apparent. One is assessed for the benefit of the people at large, and for the purpose of raising State revenue; while the other is usually imposed as a matter of local police regulation. One is a tax, and the power of the legislature to impose it is governed by the constitutional limitations upon the taxing power only, while the other is usually limited, in determining whether or not it is reasonable, to the expense incurred in issuing the license and extra police regulations or supervision incurred by reason of such business. One is imposed by the

legislature of the State having plenary power over the subject of taxation; while the other is imposed by local boards whose powers are prescribed by the charter of its particular village or city.

Respectfully,

A. A. ELLIS,
Attorney General.

Commissioner of Banking—Itemized statements—Expenses.

Section 36 of the banking law, with reference to the traveling expenses of the Commissioner of Banking, does not require that the commissioner shall *name* the bank visited and the *nature* of the business.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE, }
Lansing, November 28, 1894.

HON. T. C. SHERWOOD, *Commissioner of Banking, Lansing, Mich.:*

DEAR SIR—Your favor of November 27 asking, "In your opinion does the requirements of section 36 of the State banking law, as regards traveling expenses of the Commissioner of the banking department, require that the commissioner shall *name* the bank visited and the *nature* of the business?"

"Is not a fully itemized statement of expenses on proper vouchers with the name of the city or village visited a full and complete compliance with the requirements of the statute?"

In reply would say: The title of the act to which you refer reads: "An act to revise the laws authorizing the business of banking, and to establish a banking department for the supervision of such business."

The powers given to the Commissioner of Banking are very large. A brief reference to some of his authority might not be out of place. Under section 7 of the act he may refuse, with the consent of the Attorney General, to deliver the certificate authorizing the corporation to commence its business, even though the papers are fair upon their face. Under section 21 he may call for special reports. Under section 39, in addition to the annual examination of the business of the bank, it is provided: "He shall also ascertain whether each bank transacts its business at the place designated in the articles of incorporation, and whether its business is conducted in the manner prescribed by law." Section 44 provides: "Whenever the Commissioner shall deem it expedient he may call a meeting of the stockholders of any bank organized under the laws of this State," etc. Section 55 gives the commissioner almost absolute power over banks in certain emergencies.

There is nothing in the law which limits his discretion in that matter, except his own judgment of the expediency. And it seems to me that a careful reading of the law will show that the real object is as expressed in the title, the "supervision" of the banking business.

It is a self evident fact that any unnecessary report or statement, which has a tendency to show any irregularity or any insolvency of a bank, is injurious to the business of such bank. This principle is fully recognized in section 40 of the act, where it is provided: "The Commissioner of the banking department, his deputy, every clerk in his employment and examiner, shall be bound by oath to keep secret all facts and information

obtained in the course of such examination, except in as far as the public duty of such officer requires him to report upon or take official action regarding the affairs of such bank."

And as above suggested any unnecessary report, or any report which has a tendency to show that the standing of a bank has been called in question is liable to injure the bank, and comes within the spirit, if not within the letter of the prohibition against divulging information obtained by reason of the performance of official duty. And the rule is well settled that what is within the reason of the law is within the law, although not within the letter of the enactment.

It seems to me that the provisions of section 36 were framed with express reference to the fact that public information might injure the standing of banks, and it is therefore by said section in substance provided that the necessary traveling expenses, etc., of the Commissioner, shall be first approved by the Governor.

The Commissioner should make as full and itemized statement as he thinks he can make without injury to the banking department, or doing injustice to those engaged in the banking business. Then if further explanation is needed, it can be made to the Governor of the State, and when the bill is itemized so that it is approved by the Governor, it would seem to me that the Commissioner had discharged all his duties under the law, so far as making out bills is concerned.

I can readily see how a report in an itemized bill that the commissioner had gone to investigate some bank on the complaint that it was transacting its business contrary to law, would be of great damage to the bank, and no possible benefit to the people.

I am therefore of the opinion that the Commissioner should be governed by his own good judgment as to how far he shall disclose the nature of the business or the name of the bank concerning which the business is transacted, and that when the bills are satisfactory to the Governor of the State, and are approved by him, that the Board of Auditors could have no legal reason for complaint.

Respectfully,

A. A. ELLIS,
Attorney General.

State officers—Expenses—Salaries—Board of State Auditors.

The members of the Board of State Auditors are entitled to their necessary traveling expenses in attending the meetings of the board.

State officers generally are entitled to their necessary expenses while engaged in the discharge of their official duties.

Salaries of State officers are compensation for their services only, and do not cover expenses.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, November 28, 1894.

HON. WASHINGTON GARDNER, *Chairman Board of State Auditors, Lansing, Mich.:*

DEAR SIR—Your favor asking my opinion on three separate propositions, received.

The interrogatories are as follows:

Q1. "What right, if any, have the members of the Board of State Auditors, being non-residents of the capitol, to charge the State with their necessary expenses while attending meetings of said board at Lansing and also their necessary expenses, including railroad mileage, in going from their homes to Lansing to attend such meetings and returning therefrom?"

2. "What right have the several State officers composing said board to charge the State for the necessary expenses incurred by them in the discharge of their general official duties, outside of the meetings above referred to?"

3. "Does the salary provided by law cover all official services and expenses, or only services?"

First, The constitution of this State fixes the salary of the several members of the board, and it would not be lawful to directly or indirectly allow to such officers a larger sum without an amendment to the constitution. The same section of the constitution which fixes the salary of the Secretary of State, State Treasurer and Commissioner of the Land Office (section 1, article 9) also provides: "They shall receive no fees or perquisites whatever for the performance of any duties connected with their offices. It shall not be competent for the legislature to increase the salaries herein provided."

It will be seen that the constitution by the above section, not only provides what the board shall have for services, but also expressly provides a limit against the legislature allowing fees, perquisites, or increasing the salary.

The limitation against giving more for a certain purpose is as suggestive as the provision allowing a certain amount. The very fact that the constitution prohibits fees and perquisites, and says nothing whatever about expenses, is conclusive that the framers of the constitution did not intend that the necessary expenses of an officer should be paid out of his official salary.

At the time of the adoption of the constitution the Board of State Auditors were authorized to meet in any part of the State for the allowance of claims, and that matter was referred to in the constitutional debates.

In 1869 a statute was passed fixing the time and place of the meetings of the board, but that act certainly could not change the intent of the framers of the constitution. I do not believe it was intended at the time the constitution was adopted that members of the board should travel over the State to audit claims at their own expense, and if at the present time, it is necessary to incur expense for travel or hotel bills in the discharge of their necessary duties as members of the board of State Auditors, I believe that such claims would be legitimate claims against the State of Michigan; and there being no other mode pointed out by law, such claims would be allowed under article 8, section 4 of the constitution.

Second, Considerable of what I have already said in reply to your first question, would apply with equal force to the several members of the board when engaged in official business for the State unconnected with meetings of the board.

I have no doubt that if the Secretary of State, Commissioner of the Land Office or State Treasurer necessarily incur expense in traveling over the State in discharging the duties of their office that all such expenses are legitimate charges against the State of Michigan, and should be audited as above suggested.

Third, The salary provided by law is simply compensation for services rendered, and does not embrace the necessary expenses incurred in the discharge of the duties of the office.

Respectfully,

A. A. ELLIS,

Attorney General.

Tax sales—Surplus—Equitable apportionment.

Where a description of land is sold at a tax sale for more than the taxes and charges the surplus should be divided among the State, county and township as their interests appear.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, December 6, 1894. }

HON. STANLEY W. TURNER, *Auditor General, Lansing, Mich.:*

DEAR SIR—Your favor of this date, stating "At the annual tax sale, the taxes, together with the interest and charges upon a certain description to the day of sale, aggregated \$9.77. Sale was made to the highest bidder for \$40. The taxes were those of years subsequent to 1882," and asking, "To whom, or to what fund does the surplus of \$30.25 belong?" is received and considered. From an examination of the tax law I am constrained to believe that it never occurred to the legislature that State tax lands might sell for more than the original taxes, interest and expenses, and hence no express provision has been made in a case like the present one submitted by you.

Section 70 of the tax law of 1893 provides that if lands upon a second offer or during the sale cannot be sold for the amount of the taxes, interest and charges, the county treasurer shall bid off the same "in the name of the State, for the State, county and township, in proportion to the taxes, interest and charges due each."

A similar provision was contained in the law of 1889, and it would seem to me that under the above language the State might be regarded as a trustee, holding the lands for the State, county and township, and hence, whatever gain might arise by reason of competition in the sale should be divided *pro rata*, as the interest of each would appear by the original taxes. Such a division would certainly be equitable, and probably what was contemplated by the legislature.

Section 136 of the same law provides for the sale of delinquent tax lands at a reduced price, and in that case it is expressly provided: "The money received from the sales made under this section, shall be divided by the Auditor General, *pro rata*, between the township, county and State, as may belong to each."

Under that section, there would be a loss to both the county and township, and it is fair to say that if they, in one case under this law, are to stand the loss by reason of a sale for a less amount than the original taxes, interest and charges, in case there was a gain, they should have the benefit of such gain.

It seems to me that in a case like the one stated in your letter, you would carry out the theory of the law by dividing the surplus between the State, county and township, *pro rata*, as above indicated, and it is my opinion that it should be so divided.

Respectfully submitted,

A. A. ELLIS,

Attorney General.

Industrial Home for Girls—Permits to return home.

The superintendent of the Industrial Home for Girls has no authority to permit children to return home on account of sickness or death in such children's family, unless a rule has been adopted by the board of control permitting such departure.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, December 12, 1894. }

HON. JOHN T. RICH, *Governor of the State of Michigan, Lansing, Mich.:*

DEAR SIR—Your favor enclosing a letter to Mrs. Lucy M. Sickles, superintendent of the Industrial Home for Girls, which said letter is written by Mary Small, mother of Annie Small, one of the inmates of said home, and asking that Annie may come home on account of the fact that her father is about to die, and they desire that she be present at the funeral, in which letter the money was enclosed to pay the transportation of Annie from the home to Flint, and asking my opinion whether or not the superintendent has authority under the law to either permit children under like circumstances to go to their homes, or whether or not it is her duty to take them home under similar circumstances, is received and considered.

In reply would say that girls who are sent to the home are committed there for a definite time, and are not entitled to be discharged until the expiration of the time named, unless by reason of some rule passed by the board they are released at an earlier date.

The statute gives the superintendent no authority to return children to their homes for the purpose of attending funerals or for any other purpose, except they are taken from the institution by writ of *habeas corpus*, and it would be a plain violation of the law for the superintendent under any circumstances to permit a girl to depart from the home unaccompanied by an officer before she was duly discharged.

Under section 3 of act 117 of the public acts of 1893, I would be of the opinion that the guardians of the Industrial Home for Girls would have authority to make a rule, permitting the superintendent, in cases where the expense of the child and the attendant are paid, to permit the child to return home in charge of an attendant in any case where, in the opinion of such board, it would be for the best interests of the institution. But until such rule was made, the superintendent would have no authority whatever to send a child away from the institution, except by an order of the court, or for some reason expressly named in the statute.

Respectfully,

A. A. ELLIS,

Attorney General.

Banks—Reorganization—Adopting new name.

Where a bank reorganizes with the same stockholders and directors, it may continue under its old name.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, December 24, 1894. }

HON. T. C. SHERWOOD, *Banking Commissioner, Lansing, Mich.:*

DEAR SIR—Your question as to whether or not the Jackson City Bank of Jackson, Michigan, would have a right to take its old name on reorganizing or being reincorporated, is received and considered.

It is my opinion that the clause prohibiting two banks from having the same name was put into the law for the purpose of avoiding mistakes and indirectly prohibiting one bank from doing business on the credit of another.

Inasmuch as the Jackson City Bank is reorganizing or being reincorporated and the old bank is to cease doing business, I cannot see how the using of the name of the old bank could possibly injure the citizens of the State, and as the old bank will cease doing business on the reorganization of the new bank, it is very questionable if the prohibition in the law relative to two banks having the same name would apply in such a case.

I believe that you would be perfectly justified in allowing the new bank, with the consent of the directors and officers of the old one, to use the old name.

Under the circumstances, possibly a statement signed by the directors and officers of the old bank, to the effect that they are going out of business and are willing that the new organization should use their name, should be filed with the Secretary of State at the time the articles of incorporation of the new bank are filed.

Respectfully,

A. A. ELLIS,
Attorney General.

Inmate—Northern Michigan Asylum—Removed to state of New York, in asylum—Removal to Michigan.

Where an inmate in the Northern Michigan Asylum was removed therefrom by her daughter to an asylum in the State of New York, becoming a public charge in latter state before losing residence in this State, or gained residence in New York, it is the duty of the State of Michigan to provide for her return, and she should be taken care of by the public authorities of this State or county, as the case might be.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, December 31, 1894. }

HON. JOHN T. RICH, *Governor, Lansing, Mich.:*

DEAR SIR—Your inquiry enclosing letters which show that Mrs. Susanna Marshall, while an inmate of the Northern Michigan Asylum, was removed therefrom by her daughter and taken to the State of New York,

and soon after placed by her daughter in an asylum in that State; that the authorities of the State of New York claim that Mrs. Marshall is a resident of this State and should be removed from New York and again cared for by the State of Michigan.

From the facts set forth in the letters accompanying your communication, there can be no doubt but what Mrs. Marshall is a resident of this State, and while she was insane and actually a public charge, was removed to the State of New York and became a public charge there before she had lost her residence in this State or gained any residence in the State of New York.

These facts being conceded there can be no doubt but what it would be the duty of the State of Michigan to make provisions for removing Mrs. Marshall again to this State, to be taken care of by the public authorities of the State or county, as the case might be.

I return herewith the several communications accompanying your letter, that they may be put upon file in your office.

Respectfully,

A. A. ELLIS,
Attorney General.

Taxes—Lands sold for—Act No. 206 of the laws of 1893—Purchaser—Rate of interest.

Where a sale of lands for taxes is set aside by a decree of any court, the purchaser is entitled to no interest on the money paid.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, December 31, 1894.

HON. STANLEY W. TURNER, *Auditor General, Lansing, Mich.:*

DEAR SIR—Your favor asking, "When lands have been sold for taxes as provided in act 206, laws of 1893, and the same set aside by a decree of any court and money refunded, what rate of interest is the purchaser entitled to, if any?" is received and considered.

Section 73 expressly provides: "If a sale made under this act is set aside by any court, the Auditor General shall refund to the purchaser the amount paid at the time of the sale, out of the general funds of the State."

The language is very plain, and it seems to me could not under any circumstances be considered to include interest on the amount paid.

I would, therefore, give it as my opinion that where a sale is set aside by a decree of any court, the purchaser is entitled to no interest on the money paid.

Respectfully submitted,

A. A. ELLIS,
Attorney General.

Mining School—Clerk of board—Salary—Constitutional law.

As per opinion in Attorney General's report for 1893, pp. 189-190, covering practically the same question, I see no reason why I should change my opinion then expressed; and I do not believe that the account as presented should be audited by the board, for the reason that section 7 of act 239 of the public acts of 1887, as amended by act 41 of the public acts of 1893, has no binding force as a law, it being in conflict with the provisions of the constitution of this State, that "no law shall embrace more than one object."

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, December 31, 1894.

TO THE HONORABLE, THE BOARD OF STATE AUDITORS, *Lansing, Mich.:*

GENTLEMEN—Your favor enclosing opinions of Hon. Jay A. Hubbell, concerning the salary of the clerk of the board of the Mining School is received and considered.

Practically the same question was submitted to me by Governor Rich in June, 1893. I then gave it as my opinion that section 7, under which the compensation is claimed, had no binding force as a law. (See opinion in Attorney General's report, 1893, pages 189-190.)

I see no reason why I should change my opinion then expressed, and do not believe that the account as presented should be audited by the board.

Respectfully,

A. A. ELLIS,
Attorney General.

Representative and notary public—At the same time.

A State senator or representative cannot be appointed a notary public by the Governor during his term of office as a member of the legislature. If a man is a notary public at the time of his election as a senator or representative, he may continue to serve until his commission as notary public expires.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, January 7, 1895.

HON. ALLAN S. ROSE, *Lansing Mich.:*

MY DEAR SIR—In reply to your question, "Can a man be a representative in the legislature and a notary public at one and the same time," I have to say, that under some circumstances he can, and under other circumstances he cannot.

Where a citizen of this State had been appointed to the office of notary public and duly qualified as such officer previous to January 1, 1895, the fact of his having been elected a representative does not create a vacancy in the office of notary public. He continues to be such officer, and may discharge its duties until after the expiration of his commission, notwithstanding the fact that he is a representative in the State legislature. But if a citizen was not such notary public before the commencement of his

term as a representative, he is prohibited by the constitution of the State from being appointed to any such office, during the time that he is a member of the legislature. It all depends upon whether or not the representative was a notary public previous to the first day of January, 1895. If he was such notary public, notwithstanding his election and qualification as a representative in the legislature, he may continue to serve until the expiration of his term as notary public. On the other hand, if he was not he cannot be appointed a notary public.

Section 18 of article 4 of the constitution reads as follows: "No person elected a member of the legislature shall receive any civil appointment within this State from the Governor during the term for which he is elected. All such appointments shall be void."

Section 6 of article 4 says that "No person holding any office under the United States or this State, or any county offices, except notaries public, officers of the State militia and officers elected by townships, shall be eligible to or have a seat in either house of the legislature, and all votes given for any such person shall be void."

By article 6, the language is so clear that there is no room for doubt or construction, that the mere fact of a citizen being a notary public does not disqualify him from being a member of either house of the legislature, it is entirely immaterial whether he is or not. There is no question but that he may continue to act as notary public during his term of office.

Section 18 says that "No person elected to the legislature shall receive any civil appointment within this State from the Governor, during the term for which he is elected."

The question is, if a man is appointed by the Governor a notary public, is that a *civil* appointment within this language? The answer to this would seem to be entirely clear, that the appointment is a civil appointment; and, therefore, a representative cannot receive the appointment during his term of office. But by section 6, it is expressly provided that a notary public shall be eligible.

It seems to me that the safe rule to adopt is this: That while a notary public may be eligible for the seat in the legislature, he may continue to serve; and if it does not disqualify him, certainly he may continue after his election to discharge his duties as notary public. But some force must be given to section 18, which expressly says that "No member of the legislature shall receive from the Governor during the term for which he is elected, any civil appointment."

My conclusion is that, a man could work under his commission as notary public, up to the first day of January, 1895, and as much longer thereafter as his old commission remains in force. But, if his term of office expired on the 31st day of December, 1894, he could not be appointed a notary public by the Governor during the next two years, as it is certainly a civil appointment.

Respectfully,

FRED A. MAYNARD,
Attorney General.

Senators and Representatives—Right to live temporarily out of district.

A State Senator or Representative has a legal right to take up a temporary abode outside of the district which he represents in the legislature if he has no intention of changing his home or moving permanently out of the district or county which he represents.

STATE OF MICHIGAN, }
 ATTORNEY GENERAL'S OFFICE, }
Lansing, January 7, 1895.

HON. GEORGE W. PEER, *Rankin, Mich.:*

MY DEAR SIR—I understand that you are a farmer and that you live on your farm, and that it is your home; this farm is situated about seven miles from the city of Flint. That you also own a house and lot in the city of Flint, which is in the same county in which your farm is situated, but that it is in another representative district; that your home is several miles from a railroad station, and that it would be necessary, when you go to Lansing and return therefrom to ride several miles from the station to your home; that you desire to avoid this, and for this reason, with others, but purely for convenience, you desire to live in your house in the city of Flint, during the session of the legislature, with your wife and family; that you have no purpose or intention of removing from your representative district or changing your home, and that as soon as your duties as representative in the State legislature end, you intend to move back to the farm and to your home.

The question you ask me is this: On this state of facts is this, in contemplation of the constitution, such a removal from your district as thereby to create a vacancy in the office of representative.

I give you as my opinion, that you have a perfect right to do as you contemplate doing. Section 5 of article 4 of the constitution reads as follows: "Senators and representatives shall be citizens of the United States and qualified electors in the respective counties and districts which they represent; and removal from their respective counties or districts shall be deemed a vacation of their office." The construction to be placed upon this language is settled. By the word "removal" it was not intended that the senator or representative was to lose his office, simply because for convenience, for considerations of health, or other similar reasons, he should come here to the capitol with his family to reside, during the session of the legislature. A senator or representative has a perfect right to take up a temporary abode here at the capitol, or elsewhere, so long as he has no intention of changing his home, or moving out of the district or the county that he represents in the legislature. If such is not the proper construction, a man could not bring his family here to Lansing to live with him during the session, no matter how many the advantages to result therefrom, or how imperatively necessary it would be that he have them with him in order that he might provide for their comfort. Certainly, if you could bring your family here, you can have them spend the time in Flint, or wherever it seems best for them to be.

The whole question resolves itself then to this: What is the *intention* with which the change is made. If a man, during his term of office, with the purpose of changing his home, moves out of his county or district,

and takes up his home in another county or district, then, when the removal is made with such an intention, a vacancy in office is thereby created; because it was deemed that each county and each representative district should have its legal representative or senator, who would be authorized to act not only during the regular session of the legislature, but would be ready to respond to the call of the Governor, to meet in extra session at any time during his term of office, which he could not do if he had removed from the district or county and was no longer a qualified elector therein. But, if on the other hand, the county or district remains his home and he is absent therefrom temporarily with his family, for the convenience of his family, with no intention of abandoning his home, but leaves it with the express purpose and intention of returning to it after the session of the legislature shall end, then he has not, in a legal sense, removed from the district, and no vacancy is thereby created.

Respectfully,

FRED A. MAYNARD,

• Attorney General.

Indigent insane person—belonging to Antrim county, Michigan—Maintained in New York state.

The expenses incidental to the removal of an indigent insane person from the state of New York to Antrim county, is a legitimate claim against the state.

An indigent insane person maintained by the state of New York and belonging to Antrim county, Michigan, should be removed from the state of New York, to Antrim county; and if the person is found to be in need of treatment in an asylum, upon proper application to the probate judge of Antrim county, an order will be made admitting her to an asylum, where she will be a charge to Antrim county for a period of two years, and after two years the state shall maintain and support the patient.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, January 18, 1895. }

HON. JOHN T. RICH, *Governor of Michigan, Lansing:*

DEAR SIR—In reply to your question as to whether it is the duty of the State of Michigan or Antrim county to return Mrs. Marshall to the asylum, would respectfully say, that I have carefully examined all the correspondence that has been submitted to me, together with the opinion of ex-Attorney General Ellis, and the law relative thereto.

My conclusion is this: That there seems to be no question that Mrs. Marshall is a resident of this State, that she is an insane woman, and that while so insane she was duly committed to the Northern Michigan Asylum, that she was sent to the asylum by the judge of probate of Antrim county, she being at the time a resident of Antrim county. Under the law, Antrim county is liable for the support of Mrs. Marshall for two years at least, during which time she is what is known as a "county patient." While she was thus a county patient, chargeable to Antrim county, Mrs. Marshall was discharged from the asylum as "not cured."

She was removed by her daughter to the State of New York, where, it appears, she became violently insane, and was committed to the insane asylum of that state. The state of New York is clearly not liable for her maintenance or support; the obligation rests upon our people to maintain and support this unfortunate woman.

There is no provision of law that I can find, which covers this case. Provision is made for the payment by the counties, when removal is made from one county to another in this State, and provision made for the determination as to the liability of the county, but no provision has been made for a case like this, where the patient has gone to another state. But the intent of the legislature is clear, that each county must maintain and support its own indigent insane persons for the period of two years. After the expiration of that time the county shall no longer be obliged to bear the entire burden, but the State at large shall thereafter maintain and support the patient. But in this case, the patient has been discharged from the asylum, and is now at large, so far as the State or Antrim county is concerned, and she cannot again be returned to the prison, until proper proceedings are taken in the county that is chargeable with her support.

But, you, as the executive of this State, have become satisfied, as I understand, that the state of New York is now maintaining one of our unfortunate, indigent insane persons. It is an act of comity between the states, and a matter of simple justice that we should relieve, as soon as possible, the state of New York from this charge, and assume the burden which belongs to us. This recognition of our liability has been made by you for and in behalf of the state; and I am satisfied, on the whole, that the proper course to take is this: That you should direct the authorities of New York to send Mrs. Marshall to the superintendent of the poor of Antrim county.

After her return, if she is found to be in need of asylum care and treatment, the judge of probate of Antrim county should on application grant her a new order, and she can thereupon be again admitted to the asylum, and become a charge to Antrim county who must again assume the burden of maintaining her at the asylum, until the full period of two years shall have elapsed.

There can be no question, in my opinion, that under the circumstances of this case, while no provision has been made in the act relative to the asylums for the insane, which will cover this identical case, that the expenses incidental to the removal of Mrs. Marshall from the state of New York to Antrim county is a legitimate claim against the State, and should be paid by the Board of State Auditors when the same shall be presented to them, upon their being satisfied that each and every item therein is legitimate and necessary.

Yours respectfully,

FRED A. MAYNARD,

Attorney General.

Qualification of electors—After amendment to the constitution, November 8, 1894.

"Every male inhabitant of foreign birth, who having resided in this State two years and six months prior to the 8th day of November, 1894, and having declared his intention to become a citizen of the United States two years and six months prior to said last named day, shall be an elector and entitled to vote."

A foreign-born citizen who was allowed by law to vote in this State prior to the amendment to the constitution, is not now a qualified elector and entitled to vote, unless he had declared his intention of becoming a citizen of the United States two years and six months prior to 8th day of November, A. D. 1894, and had resided in this State two years and six months prior to said last named day.

No one shall be an elector and entitled to vote at any election, unless he shall have resided in this State six months, and in the township or ward in which he offers to vote, twenty days next preceding such election.

The people of the State have the absolute, legal right to determine for themselves the qualifications of electors, and to determine what they shall place in their organic law.

There are no limitations upon the power of the people to amend or revise their constitution in any way, or at any time they so determine, except as that power is limited by the constitution of the United States.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, January 23, 1895. }

A few days ago Attorney General Fred A. Maynard received the following letter:

OFFICE OF
COUNTY CLERK AND REGISTER OF DEEDS, }
MARQUETTE COUNTY.

GAD SMITH, *County Clerk and Register.*

Marquette, Mich., January 12, 1895.

HON. FRED A. MAYNARD, *Attorney General, Lansing, Mich.:*

DEAR SIR—Will you have the kindness to give me your opinion as to the effect of the recent amendment to the constitution, relative to qualifications of electors?

1. Is it not true that all male inhabitants of foreign birth who have resided in this State two years and six months prior to November 8, 1894, and who had declared their intention to become citizens of the United States, two years and six months prior to that date, can vote without getting their final papers, provided they comply with the provision as to residence?

2. Is it not equally true that all others must get their final papers or become citizens before they will be entitled to vote?

Anticipating an early reply to the above questions, I ask permission to publish your letter when received, as an answer to the many who have applied to me for information on the subject.

Very respectfully yours,

GAD SMITH.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, January 23, 1895. }

HON. GAD SMITH, *County Clerk and Register, Marquette, Mich.:*

MY DEAR SIR—Yours of January 12 was duly received. I have received many letters of a similar character, indicating a great interest in the questions you ask.

I have given the subject matter a careful examination, and as the result, I give an affirmative answer to each of the two questions you ask me.

Previous to the last general election, by section 1 article 7 of the constitution of this State, in all elections, every male inhabitant who had resided in this State two years and six months and who had declared his intention to become a citizen of the United States pursuant to the laws thereof six months preceding an election, was an elector and entitled to vote: Provided, of course, he was above the age of twenty-one years, and had resided in the township or ward in which he offered to vote ten days preceding such election. This section was amended at the last general election, so that it now reads as follows: "Every male inhabitant of foreign birth who having resided in this State two years and six months prior to the 8th day of November, 1894, and having declared his intention to become a citizen of the United States two years and six months prior to said last named day, shall be an elector and entitled to vote." The section was also amended by requiring that no one shall be an elector or entitled to vote at any election, unless he shall have resided in this State *six* months, and in the township or ward in which he offers to vote *twenty* days next preceding such election. In all other respects, section 1 of article 7, remains unchanged.

An examination of this section of the constitution as amended, shows that there is not the slightest possible ground for doubt as to who are now electors and entitled to vote in this State. There is no room for construction, because the language is so plain and clear, as to admit of no construction. This section as amended expressly, in terms, provides who shall be electors. It follows that those who do not come within one of the provisions of this section, are not qualified electors and cannot vote.

There is but one question that has been presented in the many letters which I have received on this subject, and that is, as to how this section of the constitution, as amended, affects male inhabitants of foreign birth in this State. The question is asked, "Must a foreigner become a full American citizen before he can vote in this State?" and second, "If so, does this affect male inhabitants of foreign birth, who before this section was amended may have been electors?" In other words, are any foreigners by this section as amended, disfranchised? My answer to this question is this: No male inhabitant of foreign birth now residing in this State can vote at any election held in this State until he shall become a citizen of the United States, and a male inhabitant of foreign birth who may have been a qualified elector last November, cannot vote next spring unless he shall be, by that time, a citizen of the United States: Provided, of course, that he does not come within the express constitutional exception, viz.: A residence of two years and six months prior to the 8th day of November, 1894, and his having made a declaration of his

intention to become a citizen of the United States two years and six months prior to said last named date. In such a case, of course, such an inhabitant of foreign birth can continue to vote.

Before this amendment all that was required of a foreigner who came to this State was a residence therein of two years and a half, and a declaration of his intention to become a citizen of the United States six months preceding an election; so that, for example, any foreigner who had come to this State to live two years and six months preceding the last general election, in November, and had declared his intention of becoming a citizen six months preceding said election, became thereby a qualified elector; but now, by reason of the amendment, all this is changed, and such a person is no longer an elector—he can no longer vote, nor can any other foreigner vote in this State, who had not declared his intention to become a citizen of the United States two years and six months preceding the 8th day of November, 1894. It by no means follows that he is permanently disfranchised—he simply must wait until he becomes a citizen of the United States, and then he can again vote.

As is well known, a foreigner can become a full American citizen, other conditions being complied with, by actually residing within the United States at least five years.

This amendment is as simple and clear as possible. It simply establishes as the constitutional condition precedent to the enjoyment of the elective franchise, that a foreign born inhabitant shall wait until he becomes a full American citizen, before he shall be allowed the privilege of voting in this State. While many seem to understand this and have no difficulty in reaching this conclusion, they inquire: "Is it possible that this amendment can be made to relate back and compel male inhabitants of foreign birth, who have once voted in this State, to give up that privilege, and not vote again until they become full American citizens, is not this in the nature of an *ex post facto* or retroactive law?" My answer is: There are no limitations upon the power of the people to amend or revise their constitution, in any way or at any time they so determine, except as that power is limited by the constitution of the United States.

The people of the State have the absolute legal right to determine for themselves the qualifications of electors, and to determine what they shall place in their organic law. The rule is settled that the people, when called upon to vote upon a proposed amendment to their constitution, are not obliged, like legislative bodies, to look carefully to the preservation of vested rights; they have the absolute power to determine what principles are best calculated to produce good government, to promote the public welfare, and secure the safety of the State. But there is nothing in the shape of vested rights secured by constitutional enactment, relative to the elective franchise. Participation in the elective franchise is a privilege, rather than a right, and it is granted or denied, on the grounds of public policy.

As I have already said, except as limited by the national constitution, the whole subject of the regulation of elections, including the prescribing of qualifications for suffrage, is left to the several states. The people declare in their state constitutions who shall be qualified electors, but the power to amend or revise their constitutions, still remains in the great body of the people as an organized body politic, who, being vested with

ultimate sovereignty and the source of all State authority, have power to amend at will, the constitution which they have made. The people have the power, and it is for them to determine when and under what circumstances they will exercise it.

In this case the people of the State of Michigan, by an overwhelming majority, have determined who shall be qualified electors. They have placed their decree in the constitution of the State, and from that decree there is no appeal, and there it must stand as the supreme law to be obeyed by all.

Yours truly,

FRED A. MAYNARD,

Attorney General.

Board of control of the Industrial School—Power to decrease or diminish the salary of the superintendent.

The Board of Control of the Industrial School has no power to increase or diminish the salary of the Superintendent.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, February 5, 1895.

HON. WILLIAM DONOVAN, *City:*

MY DEAR SIR—In answer to your question as to whether the board of control of the Industrial School has any power to increase or diminish the salary of the superintendent, I respectfully give it to you as my opinion, that the board, under the existing law, has no power to do so.

By virtue of act No. 140 of the public acts of 1891, viz.: "An act to provide for a State Board of Inspectors who shall perform the duties now performed by the Advisory Board in the Matter of Pardons, and who shall have the complete management and control of the State Prison at Jackson, the State House of Correction and Reformatory at Ionia, the Michigan Asylum for Insane Criminals at Ionia, the Branch of the State Prison at Marquette, the Reform School for Boys at Lansing, and the Industrial Home for Girls at Adrian, and to abolish all existing boards and annul all existing appointments." All acts and parts of acts inconsistent with the provisions of this act were repealed. The then board of managers of said institutions were abolished, and all appointments of officers and agents of said institutions were annulled. And the care and management of all of said institutions were placed in the power of one board of inspectors.

The purposes of this legislation and by whom it was enacted is familiar to all of us, but it became the law of the State, and was recognized as such until the session of the legislature which assembled at the capitol in 1893. This legislature proceeded at once to set aside and hold for naught this act, and pass separate acts, vesting the care and management of the several institutions in the hands of their respective boards of control. In other words, they return to the "old way of doing things." These acts are acts numbers 114, 117 and 118.

The careful examination of these different acts clearly reveals the intent of the legislature, and that is this: To recognize act No. 140 of 1891, in so far as it does not conflict with the provision of the acts passed in 1893. In other words, the legislature of 1893, did not intend to repeal absolutely and wipe out of existence act No. 140, on the contrary, they expressly intended that it should continue and be kept alive, and all of the provisions enforced, *except* so far as its terms were in contravention to the provision of the several acts above quoted. The legislature intended to destroy act No. 140 only to this extent, the one *board system*, and the theory that all these different institutions should be under the absolute control of a single board. They intended to and did kill this idea; and they also intended that each of these institutions should have their own separate boards, who should have full power to control and manage the same. And to this extent alone do these separate acts, which I have mentioned, which were passed by the legislature of 1893, in terms, destroy the act, No. 140, of 1891. So that when other questions are raised the two acts must be carefully compared on the theory that they are both in force, for the purpose of ascertaining whether or not the provisions of the acts of 1893 are repugnant to the provisions of the act of 1891. In such a case the later provisions would stand, and be law; but where there are no such repugnant provisions, and especially where there is nothing said on a given subject in the later acts, it is clear that this silence is because of the intent on the part of the legislature to preserve the provision covering the subject in the act of 1891. That this is so is clearly seen by an examination of section 5 of act No. 117, of 1893, where the legislature says in so many words—that so much “of act No. 140 of the public acts of 1891, etc., in conflict with the provisions of this act, is hereby repealed.” So revealing as plainly as words can reveal the legislative intent, that so much of act No. 140, which did not conflict with the later act, should stand and be recognized as the law of the State. In the act relative to the control and management for the Industrial Home for Girls at Adrian, while the board therein provided for is given the power to manage and control the institution, also power to make, alter and amend rules for the government of the same, and to appoint its officers and enforce its discipline, and make all such general rules and regulations as may be necessary to carry out the purposes and objects of the institution, not a word is said about salaries. And the same is true with reference to act No. 114, under which the Industrial School for Boys is controlled: The board of trustees shall have, the act says, the power to exercise full and absolute management thereof, as provided by law and make such rules and regulations and appoint all such officers and servants, and do and perform all acts and duties provided and required by law; but here again not a word is said about the salaries. By section 6 all acts and parts of acts which conflict with the provisions of this act are hereby repealed, it follows that all acts and parts of acts which do not conflict with this act continue to live. But when we turn to public act No. 118 of 1893, relative to the State Prison, etc., by section 20 we see that the amount to be paid to the warden and the deputies is expressly named and provided for, showing that in the case of these prisons the legislature intended to change the amounts provided. The warden by section 20 is to receive a sum not exceeding two thousand dollars, whereas, by section 6 of act No. 140 of 1891, the sum not exceeding fifteen hundred dollars per annum each was provided for.

From this examination of the statutes, it seems to me that there can be no question or doubt as to what the proper conclusion is; and that is, by the law as it now stands, your board have no control over the question, but it is fixed and determined by section 6 of act No. 140 of the public acts of 1891.

Yours truly,

FRED A. MAYNARD,

Attorney General.

House bill No. 188 unconstitutional.

An act authorizing Lincoln township, Arenac county, to borrow money and issue bonds, for the purpose of making public improvements, is unconstitutional.

STATE OF MICHIGAN. }
ATTORNEY GENERAL'S OFFICE, }
Lansing, February 14, 1895. }

HON. JOHN T. RICH, *Governor, Lansing:*

MY DEAR SIR—In reply to your request for a written opinion, as to whether house bill number one hundred and eighty-eight, being "An act authorizing Lincoln township, Arenac county, to borrow money and issue bonds therefor, for the purpose of making public improvements," is constitutional, I have the honor to say, it is the settled law of this State, that no township has the power to borrow money or issue bonds, except as that power is conferred by the legislature. It is also settled law, that neither the cities nor the townships of this State have the authority, in return for or upon the basis of the incidental benefits anticipated, to exercise the power of taxation in aid of private corporations, building or proposing to build railroads, to be owned and controlled by their incorporators, and that bonds issued by way of such aid, being incipient steps leading to taxation, were, therefore, unauthorized. It is also a settled law that the taxing power of the State has certain definite limits, one of which is, that the tax must be for a public purpose, and that within the meaning of these words as employed to measure the authority of the State, to demand and enforce the contributions of its citizens, a railroad in the hands of a private corporation has no more a public purpose than a manufactory, newspaper establishment or any other means for the carrying on by individuals of a business which, while private in its nature, nevertheless supplied a public need; therefore, the legislature could neither compel the taxation of municipalities in aid of railroad companies, nor could it empower them, in order to give such aid, to tax themselves, or to contract indebtedness, by the issuing bonds or otherwise which must be paid by taxation. There is no warrant for this kind of legislation in the constitution; it assumes to take from the citizen his property, under the pretense of taxation, but in a case and for a purpose not admitting of an exercise of that power. Our constitution has carefully provided a shield against the invasion of the citizen's right to his property, in the provision which grants to every person due process of law. To take a man's property from him under pretense of taxation for the purpose for which taxation is not admissible, is not due process of law, but is an unlawful confiscation.

It would be easy to greatly extend this opinion to show by a process of reasoning under the principles hereinbefore stated, that house bill No. 188, in authorizing Lincoln township, Arenac county, to borrow money and issue bonds therefor, for the purpose of making public improvements, is unconstitutional, for the reason that the words "for the purpose of public improvements" are too broad and too indefinite to comply with the constitutional provisions above quoted under the settled laws of this State, but I deem it entirely unnecessary. By an application of the principles quoted, relative to this bill, its unconstitutionality is apparent. The words "public improvements" are entirely too general and too indefinite to comply with the constitution. Who can tell but what it would be sought to have the township of Lincoln issue bonds for the purpose of aiding some railroad, or some other corporation of a semi-public character, which could no more lawfully receive the aid of the township than could the railroad.

It is against the public policy of the State itself to engage in works of internal improvement, and it is expressly prohibited by the constitution. The same principles and the same reasoning apply to the subdivisions of the State. Admitting that the legislature may authorize a township to issue its bonds, the express purpose for which the bonds are to issue must be named in the act, in order that the courts, in case the legislature is challenged, may determine whether the purpose is of that public character which is authorized by the constitution. For the reasons stated, in my opinion, the proposed act is unconstitutional, and therefore void.

Yours truly,

FRED A. MAYNARD,

Attorney General.

Board of health bill of the city of Detroit—Constitutional.

The constitution of this State does not prohibit the legislature from naming as a condition precedent to the holding of an office that the person shall be a freeholder.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, February 20, 1895. }

HON. JOHN T. RICH, *Governor, Lansing, Mich.:*

DEAR SIR—In reply to the question "Is the bill known as the board of health bill of the city of Detroit, passed yesterday by the house of representatives, and which has heretofore received the sanction of the senate, and now before you for your consideration, open to constitutional criticism by reason of the fact that the term 'freeholder' is used as a qualification for holding offices created thereby," I respectfully answer that the objection has no force, and that the bill is constitutional and valid.

I understand that the objection has been made that as by section 1 of article 18 of the State constitution, it is declared that "no other oath, declaration or test shall be required as a qualification for any office or public trust." That, therefore, by reason of these words, no law would be constitutional which provides that a man must be a freeholder or a tax-

payer in order to hold a certain office. It is said that "it would be rather a curious anomaly in our form of government, that a citizen who has the privilege of holding the high and honorable position of Governor of our State, if his fellow citizens elected him, cannot hold a petty position in a municipal corporation because he is not a property holder." Reference is also made to the case of the *Attorney General vs. Detroit Common Council*, 58 Mich., 213, and reference is also made to Mechem on Public Officers, section 67, wherein he says: "Where no limitations are prescribed the right of holding a public office under our political system, is presumed to be coextensive with that of voting at an election held for the purpose of choosing an incumbent for that office, those and those only who are competent to select the officers being deemed competent also to hold the office."

I have carefully considered these objections, and am of the opinion that they have no legal force whatever. The law is this, that the right to hold a public office under our political system is not a natural right; it exists, where it exists at all, only because and by virtue of some law expressly or impliedly creating and conferring it. It is entirely competent for the people in forming their State governments to declare what shall be the qualifications which shall entitle one to hold and exercise a public office; and in many of the constitutions this has been done with more or less certainty and precision. Where constitutional provisions have been adopted they are of course supreme, and it is not within the power of legislatures to supersede, evade or alter them. But where the constitution of the State does not provide or prescribe the qualifications for office, the legislature has the power to declare upon what terms and subject to what conditions the right should be conferred; and even where the constitution makes some provisions, but in case they are not exclusive ones, the legislature may add such others as are reasonable and proper.

Applying these general principles of law to the case in hand, we find, that there are no constitutional provisions in any way interfering with or preventing the legislature from prescribing such qualifications as they may deem necessary to the holding of such offices as we are now considering, and as are named in this bill. As I have already said, the words "and no other oath, declaration or test shall be required as a qualification for any office or public trust," have no applicability whatever to the case in hand. This is apparent from the reading of the entire section, which is as follows:

Section 1 article 18: "Members of the legislature, and all officers, executive and judicial, except such officers as may by law be exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of this State, and that I will faithfully discharge the duties of the office of according to the best of my ability.' And no other oath, declaration or test shall be required as a qualification for any office or public trust."

The word "test" here used has a recognized legal meaning in our constitutions. The word is derived from the English test acts, all of which relate to matters of opinion, and most of them to religious opinion. The clear purpose was this, that no law should be passed preventing a person from holding any office or public trust by reason of any personal religious belief that he might entertain. The word "test" is applicable to this

extent and no further. It follows, therefore, that the legislature has the complete control over the matter, so long as they are reasonable and proper. It may be true, that where no limitations are prescribed the right to hold a public office under our political system, may be regarded as an implied attribute of citizenship; but in this case the legislature in the exercise of its power has seen fit to prescribe a limitation of the holding of the offices named, viz.: That the holders of these offices should be freeholders. It is a common thing for the legislatures of the different states to enact that a large number of classes of people shall not hold offices within the State. A person may be disqualified from holding an office for the following reasons:

First, Mental incapacity.

Second, Insufficient age.

Third, Sex.

Fourth, Lack of citizenship.

Fifth, Holding prior office.

Sixth, Criminal character.

Seventh, Lack of property qualifications.

Eighth, Insufficient residence.

Ninth, Want of professional attainments.

Tenth, Preference given to veteran soldiers.

Eleventh, Requirement of civil service examination.

All of these limitations upon the privilege of holding office are valid when so decreed by the legislature, when there is nothing in the constitution of the State to prevent such legislation. As I have already said, there is nothing in the constitution of this State to prevent the legislature from doing as they have done in this case, naming as a condition precedent to the holding of the office that the person should be a freeholder. It follows that the constitutional point which has been raised has no force whatever.

Yours truly,

FRED A. MAYNARD,

Attorney General.

Trustees elected—Village of Perry.

Where three men received an equal number of votes for village trustee, it is the duty of the village council to determine by lot which of the three persons shall be deemed elected.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, March 16, 1895.

TO CLERK OF VILLAGE OF PERRY, *Perry, Mich.*:

DEAR SIR—I am asked who were elected trustees at the late village election, on the basis of the statement set forth on the annexed paper. Basing this opinion solely on this paper, I am of the opinion that Mr. Edward A. Burke, who received fifty votes, was elected one of the trustees. Charles H. Stevens, Edward A. Runyan and Loren C. Watkins each received forty-nine votes. The statute provides if there shall be no choice for any office by reason of two or more candidates having received an equal number of votes, that the council shall, at the meeting men-

tioned in the preceding section, determine by lot between such persons which shall be considered elected to said offices. (See Howell's annotated statutes, vol. 1, page 713, section 2801.)

This same section (No. 2801) is adopted in the new act providing for the incorporation of villages, and there appears as section 10 of chapter 3.

These three men received an equal number of votes and their votes were the highest received by any one. It is the duty then of the council to determine by lot which of these three persons shall be deemed elected. I think that the fair and legal way would be this: To have the names of these three candidates, viz.: Charles H. Stevens, Edward A. Runyan and Loren C. Watkins placed on three separate pieces of paper of exactly the same size and kind in a hat, box or other receptacle, then have these slips of paper drawn from said receptacle. The first drawn shall be declared to be the second trustee and the second drawn shall be declared to be the third trustee. I believe this to be the legal way, and also an eminently fair one.

Yours truly,

FRED A. MAYNARD,

Attorney General.

Mr. Todd's name cannot be placed in the democratic column by the election commissioners.

The election commissioners of the several counties of the third congressional district have no authority to allow Mr. Todd's name to appear in the democratic column.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, March 25, 1895.

HON. F. W. CLAPP, *Lansing, Mich.:*

MY DEAR SENATOR—In pursuance to your request that I give an opinion on the question as to whether in the case of the withdrawal of Mr. Gilkey, the regularly nominated candidate of the democratic party in the third congressional district for congress, Mr. Albert M. Todd's name could be inserted in place thereof and thereby have his name appear in four distinct columns in the official ballot, I will say that in my opinion, this cannot be legally done, and the election commissioners of the several counties of said congressional district would have no authority to allow Mr. Todd's name to appear in the democratic column, for the following reasons:

First, The commissioners are expressly prohibited by law from so doing. Act No. 190 of the public acts of 1891, as amended on March 14, 1895, and on that date given immediate effect, expressly provides that a candidate's name shall not appear on the official ballot more than once. It further says that "It shall be unlawful for the board of election commissioners to cause to be printed in more than one column on the ballot the name of any candidate who shall have received the nomination by two or more parties or political organizations for the same office;"

Second, The supreme court of this State after listening to most carefully prepared arguments, having decided that this law is constitutional and therefore legal. It is now the law of this State and must be obeyed

by all. It was, however, urged on the argument that as the time within which the candidate is authorized by law to exercise his choice of tickets had expired before the law took effect, he (Todd) had had no opportunity to exercise the right which the law conferred, and therefore and for that reason alone the law was held not to be applicable to Mr. Todd, and the supreme court directed the election boards of the several counties, composing the third congressional district to print Mr. Todd's name upon all three of the tickets mentioned.

This decision of the supreme court absolutely controls all cases where the acts are as stated in the Todd case, but on reflection you can see that the decision has no application to facts which did not exist at the time the decision was made. The case that you now present presents an entirely different question. The resignation of Mr. Gilkey, as I understand, was made on the 19th day of March, at least four days after the present law was passed and went into effect. He made the resignation in the light of the fact that such a law was in existence, and he must be bound by the law as every other citizen of the State is bound by it. If he desires to withdraw from the contest that is his legal privilege. The law provides for cases, where in case of resignation the vacancy can be filled, but the law which now controls is the law which I have already referred to, approved March 14, 1895. It governs in all cases except as I have already stated where by special combination of facts it cannot be made applicable because operating retrospectively. The case that you present does not come within this exception, therefore the law by its terms expressly forbids the election commissioners from placing Mr. Todd's name in the democratic column of the official ballot in case they should be so requested by him or his representatives.

Yours truly,

FRED A. MAYNARD,

Attorney General.

Traveling expenses—Bank Commissioner.

The law does not require the Bank Commissioner to name the bank visited and the nature of his business with the bank, in his statement of expenses to the Board of State Auditors.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, March 26, 1895.

HON. T. C. SHERWOOD, *Commissioner of State Banking Department,*
Lansing, Mich.:

MY DEAR SIR—You ask me this question: "In your opinion does the requirements of section 36 of the State banking law, as regards traveling expenses of the Commissioner of the Banking Department, require that the Commissioner shall name the bank visited and the nature of the business? Is not a fully itemized statement of expenses on proper vouchers with the name of the city or village visited a full and complete compliance with the requirement of the statute?"

I answer this question by saying that, in my opinion, this is all that is required by the statute. And that if the Board of State Auditors or any other department of the State, save the Governor, should require or attempt to require more, they would have no warrant of law to attempt so to do. Section 36 of the banking law reads as follows, or so much of it as is applicable to this case: "All actual and necessary traveling expenses of said commissioner, his deputy or clerks incurred in the discharge of their duties under this act, shall be fully itemized upon proper vouchers and certified in the order indicated for the salaries, and presented to the Board of State Auditors. If allowed, the Auditor General shall countersign; the State Treasurer shall, upon presentation of vouchers so allowed and countersigned, reimburse the said officer's expenses." From these words it will be seen that the duty of the Commissioner is clear, that he shall make a fully itemized statement upon proper vouchers as to the actual and necessary traveling expenses of himself, his deputy or clerks, incurred in the discharge of the duties named in said section. The Commissioner is an executive officer, he is under sworn obligations to discharge well the duties of his office, and it is for the Commissioner alone to determine what is necessary for himself or his deputy or his clerks to do in the proper discharge of his duties.

If, in the exercise of his responsible duties, he believes it is necessary for him to make a visit to a certain bank in the State of Michigan for the purpose of making an examination of said bank, no one save the Governor of the State of Michigan is in a position to criticise him or to determine that said visit was not necessary, and if he makes the visit he is entitled, under the law, to his necessary traveling expenses.

It is the duty of the Board of Auditors to examine the itemized vouchers presented to them, and determine whether the expenses charged for by the Commissioner were actual, necessary and reasonable in amount. If they find such to be the case, the said board has no further control over the matter, but must audit the claim as presented. The Board of State Auditors has no supervisory control over the department to the extent of having authority to place the Commissioner on the stand and examine and cross-examine him as to why he went to a certain place or for what purpose. That is nothing with which they have to do. Only the Governor of the State, under the constitution of the State, exercises a supervisory control over the departments, has such authority.

The matter is too clear for discussion and, therefore, nothing further need be said on the subject.

Yours truly,

FRED A. MAYNARD,

Attorney General.

City election—Held at Hastings.

The election of a city marshal was not valid; as under the new law it is an appointive and not an elective office.

The failure to elect two members of the board of review creates a vacancy which must be filled by the common council, which has the full authority, under the charter, to appoint temporarily two members of the board of review.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, April 2, 1895.

HON. SYLVESTER GREUSEL, *Hastings, Mich. :*

MY DEAR SIR—I have given the questions you requested an opinion on careful consideration. My conclusions are these:

First, That the election so far as that of marshal is concerned, held in your city on the first instant is not valid. The candidate who was elected has no claim upon the office. It is the duty of the mayor elect to appoint the marshal, and whoever the mayor appoints will be the legal marshal.

My answer to your second question is this: By reason of failure to elect the two members of the board of review there is now a vacancy which must be filled by the common council, they having full authority under the charter, in my opinion, to name temporarily the two electors for these positions. The common council may also, in case they deem that it is necessary, order a special election to fill the vacancies created by the failure to elect, and which are temporarily filled by the electors named by said council. In this case it is probable the necessity would not exist. But those chosen by the council would serve during the year, and then at the next charter election an elector can be elected to serve as a member of the board of review for one year and one for two years.

I deem it necessary to write out a long opinion to sustain the conclusions above reached. I have several pages before me now, setting forth at length the reasons for reaching said conclusions. I deem it, however, unprofitable to send them to you. I can say this, however, that your charter was amended by an act of the legislature of this State, which was given immediate effect and went into operation on Friday, the 29th day of March, A. D. 1895. From the moment the charter as amended went into effect that became the law of this State, and by it all of your citizens must be governed.

The only question that seems to have been raised in the case is this, that having no notice of the passage of the amendment, you were proceeding regularly under the charter as it was before it was amended, and that provided for the election of a marshal, and nominations were made by the different parties for that purpose. But the fact that two or more men were nominated for an office does not prevent the legislature, in the exercise of its power, from changing the charter, and making what was an elective office an appointive one. It is the settled law of this State that, where a man has been elected to an office and has entered upon the exercise of its duties, the legislature can abolish the office itself, and at one stroke the officer become a private citizen. If an officer has no claim upon the office which he holds, how much less has a nominee for an office

no legal claim upon it. The election itself, in your city, was held after the amended law took effect.

The second conclusion which I have reached in my opinion requires no argument to establish its correctness. That a vacancy exists there can be no doubt.

I find that there is no provision of law providing that those who hold the office of member of the board of review should continue to hold until their successors are elected and qualified. It is perfectly clear that the common council can at once proceed to name the two electors for the positions on the board of review.

I will say in conclusion that I am confirmed in the accuracy of my conclusions by the fact that I have had the opportunity of consulting with the Hon. Phillip Colgrove, of your city, who probably knows more about the charter and its amendments than any one else, and he concurs in the conclusions reached.

Yours truly,

FRED A MAYNARD,
Attorney General.

An elector can vote for a person not named as a candidate upon a ticket.

An elector is not confined to the candidates named for office who have been previously nominated and whose names have been regularly handed to the commissioners and by them placed on the official ballot.

It is the legal privilege of any elector to vote for anybody he pleases.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, April 3, 1895. }

MR. C. H. CHAPMAN, *Sault Ste. Marie, Mich.:*

MY DEAR SIR—You have given me this state of facts: "A man was elected supervisor in one of the townships of Chippewa county in this State, in the following manner: His name did not appear as a candidate on the official ballot, but slips bearing his name were printed and a sufficient number of the qualified electors of the township went into the booth provided by law, and after having obtained an official ballot from the inspector, pasted said slip in the proper place on the official ballot, to in this manner give him the greatest number of the votes cast."

The question of law that you ask of me is, whether a man on this statement of facts, is legally elected to the office for which he was named? In other words, the legal question that is presented is this: Were the electors of the township in question confined to the candidates named for the office who had been previously nominated and whose names had been regularly handed to the commissioners, and by them placed on the official ballot? Or is it the legal privilege of an elector to vote for anybody that he pleases? And if a sufficient number of them unite to elect a man to a given office, notwithstanding the fact that his name does not appear on the official ballot, my answer is, that such privilege exists, and is expressly provided for by section 26 of the public acts of 1893, on page 329, where the following language appears: "A ticket marked with a cross in the

circle under a party name, will be deemed a vote for each of the candidates named in such party column whose name is not erased, except those candidates where a cross is placed in the square before the name of some opposing candidate or where a name is written or pasted on the party ticket of some candidate whose name is not printed as a candidate on any party ticket. * * * If the name of any person who is not a candidate on any ticket is written or placed on the party ticket opposite the name of the office and there is a cross in the circle under the party name, the name so written shall be counted one vote for the person so mentioned, etc." This provision of the statute entirely covers the case. It shows that slips are authorized, that they can be pasted on the official ballot, and when a man can get enough of them he can get the office for which he is named. This is all that need be said on the subject.

Yours truly,

FRED A. MAYNARD,

Attorney General.

A qualified elector can hold the office of mayor of Grand Ledge.

It is not necessary for a man to be a full citizen of the United States to be qualified to hold the office of mayor of the city of Grand Ledge. He must, however, be a qualified elector of the city.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, April 4, 1895.

HON. JOHN W. FITZGERALD, *Representative, Capitol:*

MY DEAR SIR—In reply to the question as to whether or not a man not a full citizen of the United States can be mayor of your city, I have this to say: I understand from the facts you give me that, under the constitution of this State, the gentleman who has been elected mayor of your city is now a qualified elector. If that is so, it follows that he is eligible to hold the office of mayor. Section 1 of chapter 4 of act number 322 of the local acts of 1893, being "An act to incorporate the city of Grand Ledge in the county of Eaton," reads as follows: "No person shall be elected to any office in said city unless he be an elector of the city, and no person shall be elected who has been or is a defaulter to the city, or to any board of officers thereof, or to any school district, county, or other municipal corporation of the State. All votes for or any appointment of any such defaulter shall be void." Here then are the only limitations named in your charter, preventing a qualified elector of the city from holding the office of mayor.

The qualifications for officers in this State are fixed by the constitution and the laws of the State; and the general rule is, that he who is a qualified elector is qualified to hold office. There is nothing, so far as I know, that limits this rule in this case. My opinion is, that the gentleman you just elected as mayor is qualified to hold the office.

Yours truly,

FRED A. MAYNARD.

Attorney General.

Supervisor of township in Manitou county annexed to Charlevoix county.

The supervisor of Galilee township, Manitou county, is unchanged when Galilee township is detached from Manitou county and annexed to Charlevoix county, and such supervisor has the legal right to sit on the board of supervisors of Charlevoix county, and discharge all the duties that come to him in his official capacity.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, April 5, 1895. }

MR. FRED W. MAYNE, *Prosecuting Attorney, Charlevoix, Mich. :*

MY DEAR SIR—Yours of April 4 just received. In reply would state that before receiving your letter the same question had been presented to me and carefully considered. I have already given an opinion to the effect that there can be no question or doubt whatever about the legal competency of the supervisor who formerly lived in Manitou county, but now residing in Charlevoix county sitting on the board of supervisors of said Charlevoix county, and discharging all the duties that come to them in their official capacity.

Section 2 of the act to which you refer and which was given immediate effect, and which is now the law of this State, in so far as it is material, reads as follows: "The territory embraced in said township of Galilee, viz., the Beaver group of islands are hereby attached to and made a part of the county of Charlevoix, and the territory embracing the North and South Manitou islands, composing the said township of Manitou, and the North and South Fox islands, composing the township of Patmos are hereby attached to and made a part of the county of Leelanau. The respective township organizations shall continue as aforesaid, *and the several township, school and highway officers shall continue and discharge the duties of their respective offices according to law.*" So that today the township of Galilee has a supervisor and other township officers and the said township forms a part of Charlevoix county. Said township of Galilee stands exactly in the same position as any other township of Charlevoix county and its supervisor can sit on the board of supervisors and discharge any duty which comes to him as a member of said board.

The bill provides for the annexation of but one township, so that there will be but one extra supervisor.

I deem it unnecessary to extend this letter because in my judgment the question of the competency of the supervisor of said township of Galilee, to sit on said board and participate in the proceedings and count the votes heretofore cast cannot be seriously questioned.

Yours truly,

FRED A. MAYNARD,
Attorney General,

Suppression of saloons in villages.

Village councils have the legal authority to suppress by an ordinance saloons for the sale of spirituous and intoxicating liquors in villages.

STATE OF MICHIGAN, }
 ATTORNEY GENERAL'S OFFICE, }
Lansing, April 10, 1895.

HON. P. D. MILLER, *Representative, Lansing:*

MY DEAR SIR—In answer to your question, "Has the council of a village incorporated under act number 3, viz.: 'An act to provide for the incorporation of villages within the State of Michigan and defining their powers and duties,' passed at the present session of the legislature, power to prohibit the sale of spirituous and intoxicating liquors in said village?" I would say that this power is given the council by paragraph 7 of section 1 of chapter 7 of said act which provides as follows: "The council may by an ordinance suppress saloons for the sale of spirituous and intoxicating liquors." There would seem to be no possibility of misunderstanding these words. The intent of the legislature seems to be perfectly clear. By the use of the words "the council shall have the power to suppress saloons for the sale of spirituous and intoxicating liquors" it is evident that the legislature intended to give to the council of each incorporated village the legal power to prevent the sale in said village of all spirituous and intoxicating liquors by suppressing the saloons in which the liquors are sold.

"To suppress the saloon" is equivalent to saying to overthrow and crush it; to subdue it; to destroy it. This is not only the definition of the word given by the lexicographers, but that is the true meaning of the word as understood by everybody. There can be no question then as to the legislative intent. The only question in this case is this: Are these words found in the village charter opposed to or inconsistent with other provisions of law so that they cannot be legally enforced? In other words, the question may be asked does not the general State law authorize any man upon filing his required bonds to engage in the liquor traffic in this State in counties where local option does not prevail? If the answer to this question is yes, then comes the next question, if this be so, how can he be prohibited from engaging in the business in the village in question?

This objection was raised in the case of the *Village of Northville vs. Westfall*, 75 Mich. page 605. The contention of the council for the defendant in that case was that the ordinance of the village of Northville providing "that all saloons for the sale of spirituous and intoxicating liquors after the day mentioned, shall be prohibited and suppressed" was invalid as its effect was to suspend the operation of the State law giving every person the right to sell liquors upon payment of the tax and giving the requisite bond. But for reasons mentioned in the opinion the court expressed no opinion on this objection. In the case of the *People vs. Porter Vinton*, 82 Mich., p. 39, Vinton was arrested and convicted for selling liquor contrary to the ordinance of the village of Sparta. But in that case no objection was made, either in the justice's court or in the circuit, as to the validity of the ordinance, nor was it attacked in the supreme court. But on the points raised the court held that Vinton was

properly convicted. In the case of *Post vs. the Village of Sparta*, 58 Mich., p. 212 the facts were as follows: "Post, wishing to go into the saloon business in the village of Sparta, presented a bond in accordance with the requirements of the law to the council of that village. As the council had never fixed a penal sum for such bonds it was drawn in the sum of six thousand dollars which was the maximum amount required by the State law. No objection was made to the sureties who had duly justified on oath, but the council rejected the bond, for no other apparent reason than the fact that the village had, by ordinance, absolutely prohibited liquor dealing within its bounds. Post asked for a writ of mandamus to compel the council to approve his bond but the court denied the writ on the ground that the village of Sparta, organized under the general incorporation law, as amended by act No. 52 of the public acts of 1883, had the legal authority to suppress saloons.

In the case of *Feek vs. Township Board of Bloomingdale*, 82 Mich., page 393, the relator asked for a mandamus to compel the township board to approve a liquor bond. In this case the constitutionality of act number 207 of the public acts of 1889, known as the "local option law," was attacked. In this case Chief Justice Champlin in a carefully prepared opinion went over the whole ground, and decided that the act in question was constitutional, in which opinion a majority of the court concurred. It is there recognized as a well settled legal principle that the legislature may suspend or authorize legislation which will necessarily operate to suspend the general law in particular localities. That the principle is the recognition of the right of local self government, that one locality may feel the need of different local regulations from another; and, therefore, the wants of a majority of its electors are respected in granting to the local municipality, the power to enact such laws relating to their internal affairs as the feelings and wishes of the majority demand." And on page 412, Judge Champlin refers to the section now under consideration, viz.: The one authorizing the "council to suppress saloons for the sale of intoxicating and spirituous liquors." By act No. 31 of the laws of 1887, it was enacted "that it should not be lawful to establish or maintain a saloon or other place of entertainment where intoxicating liquors were sold, or kept for sale, within one mile of the Soldeirs' Home." This act was held constitutional and valid in *Whitney vs. The Township Board*, 71 Mich., p. 234. Other instances of such kind of legislation are given in the opinion. There is nothing in the constitution forbidding the legislature from enacting laws for particular localities, or suspending the general laws in certain localities. On the contrary, there is an unbroken record of instances where such legislation has been had without question, and such laws have been upheld by the decisions of the supreme court.

Without extending this opinion or making a further review of the authority, there can be no question, in my opinion, but what, under the section that I have considered, the council of any village of this State, incorporated under the act referred to, can suppress the liquor traffic in said village, by suppressing the saloons in which the liquors are sold, and the easiest way to do this is to refuse to approve of the bonds offered by the man who would engage in the business.

Yours truly,

FRED A. MAYNARD,
Attorney General.

House bill No. 99, file No. 20—St. Mary's Lake drain—Constitutional.

Where a drain has actually been constructed and is now in use and of great public utility, and taxes were spread therefor before any legal steps were taken to void the proceedings, but afterwards the entire proceedings were held void by reason of defects in the steps taken to lay out the drain, it is competent for the legislature to pass a law to reestablish said drain and to provide for the cost of construction, and the law is constitutional and valid.

STATE OF MICHIGAN, }
 ATTORNEY GENERAL'S OFFICE, }
Lansing, April 11, 1895.

HON. JAMES K. FLOOD, *Representative, Lansing:*

MY DEAR SIR—At your request I have made careful examination of house bill No. 99, file No. 20, entitled "A bill to provide for and authorize proceedings for legally establishing the so-called St. Mary's lake drain in the township of Riverton, Mason county, Michigan, and to provide for and authorize the assessment and collection of taxes therefor," for the single purpose of determining whether the bill, if enacted into law, would be a constitutional measure.

In the consideration of the legal question involved it is necessary to refer briefly to the facts of the case.

My understanding of the facts is this: In 1884, proceedings were had for the establishment and construction of certain drains in the county aforesaid. They were actually constructed and orders issued for the work done, which were, in many instances, negotiated before the final completion of the drains. After the completion of the work taxes were spread upon the rolls to raise a fund to pay said orders, but a bill was filed in the circuit court for the county of Mason in chancery, by a resident of the township, praying that the collection of the taxes be restrained because of certain irregularities in the proceedings in said bill set forth. Upon the hearing of the case a decree was entered declaring the proceedings void and restraining the collection in that particular instance of the taxes assessed against the complainant. The treasurer of the township who had the collection in charge made no further efforts to collect the further taxes from other persons.

The purpose of house bill No. 99 is to provide an adequate way for the reestablishment of the drain and a reassessment of taxes for the payment of the cost of construction. The single question of law involved in this case is this: Where drains have actually been constructed and are now in use and of great public utility, and where taxes were spread therefor before any legal steps were taken to void the proceedings, but afterwards the entire proceedings were held void by reason of certain defects in the steps taken to lay out the drain; on this statement of facts, is it competent for the legislature to pass a law to reestablish said drains and provide for the cost of construction? This question seems to have been fully answered by Judge Cooley in *Brevort vs. Detroit*, 24 Mich., p. 325, where the point was made that "the original assessment being void, there was no constitutional power in the legislature to order a reassessment." Judge Cooley says: "The power of the legislature in such a case depends upon the nature of the original infirmity. If the difficulty there was that the sums assessed did not constitute any just or equitable charge for public purposes upon the property upon which it was sought to be imposed,

it is quite clear that the legislature could not make it such a charge. But if the defect consisted in some irregularity of proceeding, or in some oversight in the law itself, in consequence of which a just and equitable claim had failed to be legally imposed, there can be no good reason why the legislature should not retrospectively supply the oversight or cure the irregularity." In the case that he was then considering the actual difficulty was that no apportionment was provided for by the act under which the first assessment was made. That it was held that there could be no reasonable objection to this being provided for by a new assessment. That where a "claim is both legal and equitable but cannot be enforced by reason of the absence of certain legal provisions, the legislature can step in and do what is just in the premises, by supplying such provisions."

There are many authorities on the subject which could be cited if necessary to sustain the opinion of Judge Cooley, but I do not think it necessary to refer to them.

And I understand from the facts in this case, the legislature of this State, under the opinion cited, has a constitutional authority to pass the bill in question, and, if passed, the law would be constitutional and valid.

Yours truly,

FRED A MAYNARD,
Attorney General.

Taxation of dogs.

Act No. 198 of the public acts of 1877, provides in plain terms for a tax upon dogs, and is in full force and effect.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, April 16, 1895.

HOUSE OF REPRESENTATIVES:

GENTLEMEN—In reply to your request for my opinion, would say that the original dog tax law was created by act No. 198 of the laws of 1877, which was an act of nine sections, "to provide for a tax upon dogs, and to create a fund for the payment of certain damages for sheep killed or wounded by them in certain cases" The law as then passed remained in full force until 1881, when the legislature of that year by act number 283, amended sections five and six of the law of 1877, and added an additional section, which was known as section ten. The amended sections five and six contained provisos by which a justice of the peace of the township or city where such killing or wounding of sheep occurred, was to view the dead or wounded animals, and to estimate the amount of damages sustained by the person owning them, and to make a certificate thereof in writing, to be delivered to the clerk of said township or city, who should file it in his office and record it in the record of the township or city. Section six as amended provided for the payment of such damages and the apportionment of any surplus that might remain. Section ten was to provide a penalty for keeping sheep-killing dogs.

In 1889, the legislature passed an act, No. 214, which contained four amendatory sections to the dog tax law then in force, expressing such amendment in its title, which was "An act to amend act number one hundred and ninety-eight of the session laws of eighteen hundred and

seventy-seven, entitled 'An act to provide for a tax upon dogs, and to create a fund for the payment of certain damages for sheep killed or wounded by them in certain cases,' approved May 23, 1877, as amended by act No. 283 of the public acts of 1881, approved June 11, 1881, by adding four new sections thereto to stand as sections eleven, twelve, thirteen and fourteen." These four sections provided "That all moneys collected by any township treasurer under the provisions of the dog tax law as then in force, should be paid by him to the county treasurer, to be kept as a special fund for the payment of any losses sustained by any person from the killing or wounding of sheep or lambs by dogs within such city or township or part of township. The township boards of townships and the common councils of cities were authorized to examine all certificates of damages filed with the township clerk or city clerk during the preceding year, and to order the payment of all such losses as they might consider just, out of the fund provided." The remainder of the additional sections contain provisos by which the county treasurer was to pay the orders; also what should be done in case the fund was insufficient, or in case there was a surplus.

By act No. 141 of the public acts of 1891, the legislature repealed act No. 214 of the public acts of 1889, which contained the four amendatory sections above referred to, and left the law as it was made by act No. 283 of the public acts of 1881. Act No. 141 besides its repealing clause created an additional section which provided, that all "moneys now in the hands of the county treasurers as the result of the amendment of 1889, should be returned to the several township or city treasurers to which the same belong respectively, upon demand thereof."

There is, therefore, no doubt but that act No. 198 of the public acts of 1877 is the present law, providing, in plain terms, for a dog tax. The legislature in 1893, in the general tax law of that year, have fully recognized the existence of the law of 1831, as they specifically say in act No. 206 of the public acts of 1893, page 365, that the number of dogs of all kinds over six months old are to be included in the taxable personal property.

Yours truly,

FRED A. MAYNARD,

Attorney General.

Supervisor of township in Manitou county annexed to Charlevoix county.

The supervisor of Galilee township, Manitou county, is unchanged when Galilee township is detached from Manitou county and annexed to Charlevoix county, and such supervisor has the legal right to sit on the board of supervisors of Charlevoix county, and discharge all the duties that come to him in his official capacity.

STATE OF MICHIGAN, }
 ATTORNEY GENERAL'S OFFICE, }
 Lansing, April 18, 1895.

HON. WILLIAM HARRIS, *Representative, Lansing.*

MY DEAR SIR—Relative to the question of the legal competency of the supervisors who formerly lived in Manitou county but now of Charlevoix county, to sit on the board of supervisors of said Charlevoix county, and discharge all the duties that come to them in their official capacity, I

would call your attention to section two of the act in question, which was given immediate effect, and which is now the law of this State. So far as it is material to this case it reads as follows: "The respective township organizations shall continue as aforesaid, and the several township, school and highway officers shall continue and discharge their respective office according to law." It is, therefore, a fact that the townships now forming a part of Charlevoix county, by reason of the act just passed, stand in exactly the same position as any other township of said county.

In my opinion there is no doubt but what the supervisors of said townships can sit on the board of supervisors, and discharge any duties which come to them as such officers.

It seems wholly unnecessary to lengthen this opinion, for the reason that, in my judgment, the question of the competency of the supervisors of said townships to sit on said board, and participate in the proceedings and count the votes heretofore cast, is very clear and direct.

Yours truly,

FRED A. MAYNARD,
Attorney General.

State's title to lands along the right-of-way of the Clinton and Kalamazoo canal.

The State has really no interest whatever in the Clinton and Kalamazoo canal, or in the land which was to be used for the tow-path. It has failed to use any of this land for forty-five years, and has voluntarily relinquished any claim of interest in and to the lands which had been conveyed to it by private persons, for canal purposes.

It is advised that the legislature pass a joint or concurrent resolution reciting the facts and declaring in behalf of the State that it relinquishes all right, title and interest in and to the property, and declare that the lands shall revert to the original grantors, or to their heirs, executors or assigns.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, May 16, 1895.

TO THE HOUSE OF REPRESENTATIVES:

GENTLEMEN—In obedience to your request that I investigate, ascertain and report to the house what, if any, interest the State of Michigan still possesses in the title to lands along the right of way of the Clinton and Kalamazoo canal, and what steps, if any, should be taken to establish the rights of the State therein, I have the honor to report as follows: In the early days, more than fifty years ago, the State authorities thought it wise to engage in works of internal improvement, and the principal work that it undertook was the construction of what is known as "the Clinton and Kalamazoo canal."

By virtue of act number 97 of the laws of 1837, a board of commissioners of internal improvements was created. This act was amended by act number 122 of the laws of 1838, act No. 104 of the laws of 1839, and act No. 63 of the laws of 1840. By section 3 of act No. 97 of the laws of 1837, provided that said board are hereby constituted and appointed the supervisors and overseers of public work; the general care and supervision of all canals, railroads and other improvements to be constructed by the

State, shall be vested in and under the direction and control of said board; and by section nine said board is "authorized to enter into, make and execute any contracts with any person or persons for the construction of any works of internal improvements which the board shall be directed to construct by the legislature.

Act No. 67, of the laws of 1837, provides for the construction of certain works of internal improvements; and among others, in section 5, for the survey of a canal, or for a canal part of the way and a railroad the balance of the route, commencing at or near Mt. Clemens, on the Clinton river, and to terminate at or near the mouth of the Kalamazoo river. By act No. 76 of the laws of 1838, act No. 91 of the laws of 1838, and act No. 50 of the laws of 1841, appropriations to the aggregate amount of \$290,000 were made by the legislature for the building, maintaining and repairing of this canal. By act No. 25 of the laws of 1843, \$5,570 was appropriated for paying for all arrearages of work done and materials furnished on the canal.

In 1841 there was granted by congress to the State 500,000 acres of land, for the purpose of internal improvements; and thereafter, by act No. 32 of the laws of 1843, act No. 27 of the laws of 1844, act No. 27 of the laws of 1845, and act No. 139 of the laws of 1846, warrants or scrip was issued by the commissioners of internal improvements, for such repairs and other expenses in building and maintaining the canal, as was expended by them. The State evidently getting tired of running the canal (as they had been obliged to pay for the amount that they had run behind), in 1842, by joint resolution No. 36 provided that the board of commissioners of internal improvements be authorized and empowered to lease the Clinton and Kalamazoo canal for a term of not exceeding twenty years. And by joint resolution No. 20 of the legislative session of 1846 the commissioners were again authorized to lease the canal for a period not exceeding twenty years.

Act No. 76 of the laws of 1847 abolished the office of acting commissioner of internal improvements and vested the powers and duties performed by the board or by the acting commissioner of internal improvements in the State Treasurer, Secretary of State and Auditor General. By act No. 93 of the laws of 1847 the Auditor General and Secretary of State were authorized and empowered to lease in writing the Clinton and Kalamazoo canal between the villages of Fredrick in Macomb county and Rochester in the county of Oakland for a term not to exceed five years. There is nothing appearing of record to show that such a lease was ever made so far as I have been able to ascertain. This is the last act of the legislature that I can find with regard to this canal. But the people of the State of Michigan having become sick and tired of prosecuting works of internal improvements, and especially of trying to run this canal, took the first opportunity of making it impossible for such work ever to be attempted again; and in the constitution under which we are now living a provision was incorporated which now stands as section nine of article fourteen and reads as follows: "The State shall not be a party to, or interested in, any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of land or other property." Before this time the property owners along this canal had by deed conveyed for canal purposes to the State a certain strip of land running alongside of the canal. The forms of the deeds vary; some are

absolute conveyances to the State, some are for canal purposes only, and others, I am informed, provide for reversion to the land owners in case the State should cease to use the canal. But since the adoption of our present constitution, in 1850, now nearly forty-five years ago, the State has not assumed any right over the lands which were deeded to it for purposes of right of way; but the land owners have taken possession of the narrow strip and have occupied and used it for these many years. The water in the canal, however, has been utilized by certain mill owners for years past.

It appears from this statement of facts that the State has really no interest whatever in the canal or in the land which was to be used for the tow-path; that by its own solemn declaration embodied in the organic law of the State, and its failure to use any of this land for forty-five years, it has voluntarily relinquished any claim and interest in and to the lands which had been conveyed to it by private persons for canal purposes.

I am of the opinion that the State has no interest whatever in and to the land in question, and that it would be a source of embarrassment if the State was called upon to make any claim of ownership. Still the deeds which have heretofore been received by the State and duly recorded, constitute more or less of a cloud upon the title; and it probably would be best in order to forever settle this matter and to remove any clouds that may exist upon the title to the different pieces of property through which the canal runs, to have a joint or concurrent resolution passed reciting the facts, and therein containing the declaration of the State of Michigan, that it relinquishes all right, title and interest in and to the property in question, and declaring that the lands shall revert to the grantors in the deeds or to their heirs, executors or assigns.

The only other question in the case is as to the right to the use of the water in the canal, and that is an entirely private matter in which the State is not interested.

Yours truly,

FRED A. MAYNARD,

Attorney General.

STATE OF MICHIGAN—CONCURRENT RESOLUTION.

WHEREAS, By act number sixty-seven of the laws of eighteen hundred and thirty-seven provision was made for certain works of internal improvements, and among others, in section five, for the survey of a canal, or for a canal part of the way and a railroad for the balance of the route, commencing at or near Mt. Clemens on the Clinton river and terminating at or near the mouth of the Kalamazoo river, which canal was constructed in part, and has, for years past, been known as the Clinton and Kalamazoo Canal; and

WHEREAS, The State of Michigan many years ago abandoned this canal, and the people of Michigan afterwards incorporated in the constitution of this State, in section nine of article fourteen, the following provision: "The State shall not be a party to, or interested in, any works of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of land or other property;" and

WHEREAS, Before the construction of this canal certain owners of land lying adjacent thereto, did convey to the State small portions of their

land, which would be required in and about the construction and operation of said canal, which deeds are now on record; and

WHEREAS, The State having abandoned the canal and the lands which were so as aforesaid conveyed, it is right and proper, as the State no longer has use for said lands, that the parties who originally owned the lands, or their representatives, heirs or assigns, should be reinvested with the title thereto; therefore

Resolved by the House, (the Senate concurring), That the State of Michigan does hereby formally relinquish all of its right, title and interest in and to the lands so received by the State, for the purpose of the Clinton & Kalamazoo Canal, and does hereby formally abandon the same; and the Governor of the State is hereby authorized and empowered to convey to the original grantors of said lands, or their heirs, representatives or assigns whatever interest the State may have received from said grantors.

Act No. 53 of the laws of 1877, as amended by act 112 of 1883, constitutional.

Where a law has been in full force and effect in this State for eighteen years, and its validity has never been seriously questioned, and the legislature has given it recognition by way of amendment, its provisions should be held valid, and its validity upheld by the State authorities, until held invalid by the courts.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, May 29, 1895.

HON. HENRY R. PATTENGILL, *Superintendent of Public Instruction, Building:*

MY DEAR SIR--In reply to your communication of May 24, asking for my opinion as to the constitutionality of act number fifty-three of the laws of 1877, as amended by act number one hundred and twelve of the laws of 1883, I desire to state that the statute has been in full force and effect in this State for eighteen years, and during all that time its validity has never been seriously questioned, and during which time the legislature has given its recognition by way of an amendment.

It is my opinion that the length of time that the law has remained unquestioned and its recognition as a valid law by legislative amendment, should be considered in passing upon the constitutionality of the law. The practical construction of the law by long, notorious, unquestioned usage, should be treated as a ratification of the law by the sovereign people, and its provisions should be followed and its validity upheld by the State authorities, until declared invalid by the courts.

Yours truly,

FRED A. MAYNARD,
Attorney General.

Coroner's fees—Inquest on deceased stranger—Found dead in the Detroit House of Correction.

Where an inquest is held on the dead body of a stranger not belonging to this State found dead in the Detroit House of Correction, the coroner's fees and expenses in and about the holding of the inquest is a valid claim against the State of Michigan.

Where the person found dead is a stranger and not belonging to this State, and not an inmate of any prison or house of correction, the circuit court of the county is the proper tribunal to audit the claim, when the coroner shall certify to it that to the best of his knowledge and belief the person found dead was a stranger not belonging to the State, and the Auditor General has no control over the action of the circuit court in allowing the account of the coroner for the expenses incurred in and about the inquest: for the act is ministerial, and he has nothing to do except to draw his warrant for the amount audited by the circuit court.

Where the person found dead was a stranger, not belonging to this State, and was found dead at the Detroit House of Correction, and at the time of his death was a prisoner confined therein, the Board of State Auditors is the proper body to audit the claim for the coroner's fees and expenses in and about the holding of the inquest.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, May 28, 1895.

BOARD OF STATE AUDITORS:

GENTLEMEN—I have considered the claim of Daniel M. Bulter, which was referred to me, for the purpose of determining whether or not it was a legal claim against the State of Michigan. On the face of the claim the facts are these: An inquest was held on the body of Edward Smith, found dead at the Detroit House of Correction, in the county of Wayne, on the 8th day of March, 1895, by Daniel M. Butler, one of the coroners of Wayne county. The itemized fees and expenses in and about the holding of said inquest, amount to fifty dollars and fifty-three cents. Accompanying the claim is the following certificate:

"I hereby certify that the within amount is correct and lawful, that the services were rendered as stated, and that the deceased person was a stranger, not belonging to this State."

"March 8, 1895.

(Signed)

DANIEL M. BUTLER,

Coroner."

Also the certificate of J. W. Donovan, one of the circuit judges for the county of Wayne, as follows:

"STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE.

"The within account of Daniel M. Butler, coroner of said county, is hereby approved in open court in the sum of fifty dollars and fifty-three cents."

I am of the opinion that, on this statement of facts, the claim is a valid claim against the State of Michigan. Section 9593, vol. 3, of Howell's annotated statutes, reads as follows: "When any justice of the peace shall take an inquest upon the dead body of a stranger and he shall certify that to the best of his knowledge and belief, the person found dead was a stranger, not belonging to this State, the expense with the justice's fees and all the expenses of the inquest shall be paid to the justice of the peace from the State treasury; the account of such expenses

and fees being first allowed by the circuit court for the county. But in all other cases the expenses and fees shall be paid by the county in which the inquest was taken: *Provided*, That when an inquest is held on the body of any person who dies in either of the prisons or public reformatories of this State, the expenses of such inquest shall be audited and paid by the State as other charges against the State are audited and paid."

By section 9595 it is provided "that it shall not be competent for justices of the peace within incorporated cities to hold inquest, but the county coroner, who resides therein, must hold it, except under special circumstances, which are unnecessary to refer to in this case.

I understand that certain questions have arisen in regard to these classes of claims, and as to who is the proper person to audit the claims; but I think, in view of the facts of this specific claim, as they appear on the face, that there can be no question but what the law of the matter has been established by the supreme court of this State. I refer to the case of *La Chance vs. Auditor General*, 7th Mich., 563. In this case the supreme court held, that the Auditor General has no control over the action of the circuit court in allowing the accounts of a justice of the peace for the expenses incurred in and about an inquest held upon the dead body of a stranger, that *mandamus* lies to compel him to draw his warrant upon the State Treasurer for the account as allowed; that the Auditor General has no appellate powers over other auditing bodies, and his duty in regard to the allowances made by the proper bodies or persons is simply the ministerial duty of issuing the proper warrant; that the auditing of claims against the State is an administrative function to be performed by the persons to whom the law has entrusted it, and the State imposed such duties where it supposed they will be properly attended to. That the circuit courts, from the earliest period, have been selected for such service in many cases; that it is to be taken for granted that the legislature can protect the State by all necessary safeguards, and neither any State officer nor this court has been given power to substitute his or our judgment for that of the auditing authority acting on matters legally referred to that person or body. In the present case, as is exactly the case here, the claim was presented and heard by the tribunal appointed by law to pass upon it, and the items allowed are the result of that hearing. The circuit court was in a better position than either the Auditor General or this court can be to know whether they were more liberal than was desirable. But, however this may be, they were actually incurred, and the circuit court approved them, and the act of the court is not subject to our criticism.

There is no more legal reason to assume that the circuit court will not do its duty (in protecting the State from an illegal or excessive claim) than that any other officer or court will do so: That was honestly done by the justice and approved by the circuit judge who sits in the vicinity and as every means of judgment is not outside of the discretion given by law and is not open to review. The Auditor General seems to have acted in the proper desire to have it determined how far his duties extend. He is not responsible for the law, and he has no control over its administration by the circuit courts. The *mandamus* prayed for must be allowed with the costs of this court, according to law, payable out of the treasury.

This decision of the supreme court settles this case if it be true that the deceased person, Edward Smith, was a stranger not belonging to this

State, who was found dead at the Detroit House of Correction, in the county of Wayne, and not an inmate therein. But if, as a matter of fact, Edward Smith, on whom the inquest was held, was a prisoner, confined in the Detroit House of Correction at the time of his death, then the case would be entirely different.

On the first theory, the claim having been duly audited by the circuit court for the county of Wayne, which, by law, is made the auditing body, there would be nothing to be done except for the Auditor General to draw his warrant for the amount so audited, viz. : \$50.53.

If, on the other hand, Smith was an inmate of the prison, the other section of the law which I have above quoted, would apply, namely, "when an inquest is held on the body of any person who dies in either of the prisons or public reformatories of this State, the expenses of such inquest shall be audited and paid by the State as other charges against the State are audited and paid."

In such a case, of course, the claim should be investigated by the board of State Auditors. The circuit court for the county of Wayne, in such a case, would have no jurisdiction over the matter; and the certificate of the circuit judge (he having no jurisdiction in the matter) should be treated as a nullity.

The whole question hinges upon the one single fact as to whether or not Edward Smith, on whose body the inquest was held, *was*, at the time of his death, *a prisoner* confined in the Detroit House of Correction. If he was, then the Board of State Auditors is, under the law, the proper body to audit the claim; if he was not, and simply happened to be at the Detroit House of Correction at the time of his death, and was a stranger to the State, then, in such a case, the circuit court for the county of Wayne would have jurisdiction, and the Auditor General would be obliged, under the law, to audit the claim allowed by the circuit court.

The question of fact is a matter of record which can be easily ascertained, and, as that fact appears, the course that I have indicated should be adopted.

Yours truly,

FRED A. MAYNARD,

Attorney General.

Village officers and members of the village council—Prohibited from receiving pay for doing village printing.

No member of the village council, nor any officer of the village is allowed by law to make a contract with the village of which he is an officer or trustee, to do the corporation printing, or enter into any contract with the corporation during his term of office.

The law was enacted for the express purpose of preventing collusion and fraud, by prohibiting trustees or village officers from acting in a double capacity, which is considered, in law, against public policy; and any violations of the provisions of the law would work a forfeiture of the office, and the council may declare the office vacant on the proper proof being presented to them of the violation of the law in this respect.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, June 12, 1895.

MR. GEO. H. WOOD, *Manager the Mackinaw Witness, Mackinaw, Mich.:*

MY DEAR SIR—Yours of the 11th inst. received. In answer to your questions I will state that, in my opinion, section 6 of chapter 5 of act

No. 3 of the laws of 1895, which reads as follows: "No member of the council, nor any officer of the corporation, shall be directly or indirectly interested in any contract or service made by, or to be performed for the corporation: *Provided*, That this shall not prevent officers receiving compensation authorized by this act. Any violations of the provisions of this section shall work forfeiture of the office, and on proof thereof the council may declare the office vacant," prohibits a trustee of any village in this State from doing the corporation printing for the village of which he is a trustee. This prohibition extends to the village clerk, or any other officer of the village.

A trustee or any other officer of a village by the above quoted law, is prohibited from manufacturing furniture, apparatus, buildings, etc., ordered by the council and drawing pay therefor from the village of which he is an officer or trustee. And such officers or trustees are prohibited from performing any service and receiving any pay therefor from the village, except work and service in the line of their official duty, as authorized by the act.

The word "contract" in said section 6 should be construed in its broadest legal sense; for the law not only prohibits a trustee or officer of the village from making a contract with the village of which he is an officer, but that he shall not perform any services or be interested, directly or indirectly, in any contract or service to be performed for the village, except, as above stated, as authorized by the act.

Section 6 of chapter 5 of the act was so enacted for the express purpose of preventing collusion and fraud, or any semblance of it, by allowing trustees or village officers to make contracts with themselves and pay themselves. Or in other words, to prevent their acting in a double capacity, to wit, that of protecting the public interests as officials, and personal, selfish interests as contractors, which is considered in law against public policy and the best interests of the people. I do not think that a violation of the law in this respect will invalidate other acts of an officer or trustee of a village before the council have declared the office forfeited and vacant; but after the council declared the office vacant the trustee or officers could not legally act.

The president of a village is a member of the council, but he has no right to vote upon any question, except in case of a tie, in which case he shall give the deciding vote.

I think this will answer all your questions fully, which you have asked, if I understand their meaning correctly.

Yours truly,

FRED A. MAYNARD,
Attorney General.

Voters—Annual school meeting.

A person otherwise qualified can vote at the annual school meeting, if he has real or personal property liable to assessment for school purposes.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, June 21, 1895.

MR. FRANK E. WITHEY, *Prosecuting Attorney, Manistee, Mich.:*

MY DEAR SIR—Your communication concerning the right of persons to vote at an annual school meeting received.

In my opinion the right of a person to vote at any annual school meeting does not depend wholly, as to the property qualification, upon the fact that the persons pays taxes on real estate, or has real estate liable to taxation. The point to be determined is, whether the person has any property liable to assessment for school tax, and not whether it be actually assessed and a tax paid thereon. If a person is otherwise qualified and has property, real or personal, liable to assessment for school purposes, such person would be a qualified voter.

Yours truly,

FRED A. MAYNARD,
Attorney General.

Hawkers and peddlers' license law of 1895—Unconstitutional—Old hawkers and peddlers' law, sections 1257 to 1266 inclusive, of Howell's annotated statutes, now in force.

Act 137 of the laws of 1895, is unconstitutional, for the reason that the object of the law is not expressed in its title, and, therefore, violates section 20 of article 4 of the constitution of this State, which provides that "No law shall express more than one object which shall be expressed in its title.

Sections 1257 to 1266, inclusive, of Howell's annotated statutes were not repealed by act 137 of the laws of 1895, and is the law now in force in this State, regulating the licensing of hawkers and peddlers.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, June 21, 1895.

MR. ELECTUS B. HOWARD, *Deputy State Treasurer:*

MY DEAR SIR—In answer to your question, "Is act number one hundred and thirty-seven of the laws of eighteen hundred and ninety-five, being an act to amend section one (1) of act number two hundred and four of the session laws of eighteen hundred and eighty-nine, better known as the 'Hawkers and peddlers' license law,' constitutional?" and further "Does it repeal sections 1257 to 1266, inclusive, of Howell's annotated statutes?" I would say after a careful examination of act number one hundred and thirty-seven, that it is simply an act by which the legislature undertook to amend act number two hundred and four of the session laws of eighteen hundred and eighty-nine, so as to make that law operative upon the whole State and not confine its provisions to the upper peninsula alone.

When the legislature, as in this case, undertakes by amendment to extend the operations of a law and give to it a greater force and effect, the title to the act must be amended:

Eaton vs. Walker, 76 Mich., 579.

The object of act number one hundred and thirty-seven is to take the licensing of hawkers and peddlers from the State Treasurer and place it with the township boards, and provides that all sums received as license fees shall be paid into the township treasury, instead of the State treasury.

I am clearly of the opinion that the object of the law is not expressed in its title, and, therefore, it violates section 20 of article 4 of the Constitution of this State, which provides that "no law shall embrace more than one object which shall be expressed in its title:"

Wilcox vs. Paddock, 65 Mich., 28.

Eaton vs. Walker, 76 Mich., 579.

N. Y. M'fg Co. vs. Wayne Judge, 58 Mich., 385.

Brooks vs. Hydron, 76 Mich., 273.

There is nothing in the title of the act indicating in any way the real object of the law, or that the law shall be operative in what is known as the "lower peninsula" of the State of Michigan—the purposes, however, are covered by the body of the act.

No person examining the title of the bill while it was pending in the legislature would have suspected its real object, or that it had any reference to the lower peninsula. It would naturally at least lead any person to believe that the law was not to be extended beyond the limits of the upper peninsula.

And as to your question "Are sections sixteen to twenty-five, inclusive, of chapter twenty-one of the laws of eighteen hundred and forty-six repealed?" I will say that at least an oversight was made by the legislature in undertaking to repeal those sections; as the title and act both state that "section six of chapter twenty-one of the revised statutes of eighteen hundred and forty-six," instead of sections *sixteen to twenty-five*, inclusive. However, this is partially, if not fully, overcome by it being further stated in the title and in the act that it is sections 1257 to 1266, inclusive, of Howell's annotated statutes, which they desire to repeal.

I think that it clearly appears that it was the intention of the legislature to repeal sections sixteen to twenty-five, inclusive, of the laws of eighteen hundred and forty-six, and amendatory acts thereof, which are sections twelve hundred and fifty-seven to twelve hundred and sixty-six, inclusive, of Howell's annotated statutes.

It is elementary that the same statute may be in part constitutional and in part unconstitutional; and if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. And in this case, upon the question as to the validity of that part of the act which repeals the old law (sections 1257 to 1266, inclusive, of Howell's annotated statutes), I think the rule is, that if the different parts are so mutually connected with and dependent on each other as conditions or considerations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect, the legislature would not have passed the repeal of the old law independently; and the new law, which was designed to take the place of the old law, is unconstitutional, then the repeal of the old law must fall with the other. To hold otherwise would be to strike from our statutes all law regulating the licensing of hawkers and peddlers, which the legislature never meant or intended to do.

I am of the opinion that the repealing of the old hawkers and peddlers' law was but an incident in the passage of the new law, and the legislature *intended not to repeal* the law relative to hawkers and peddlers entirely, but to enact a new law to take its place, and that the legislature would

not have repealed the old law without enacting a new one to take its place. And where the constitutional and unconstitutional provisions of a law are so connected as to warrant the belief that the legislature would not repeal the old law without enacting a new one to take its place, and the new law is invalid, then the whole law should fail and be declared a nullity, for the reason that the people should not be left without any provisions of law in the matter.

For the reasons heretofore stated act number one hundred and thirty-seven of the laws of eighteen hundred and ninety-five, is invalid, and it does not repeal sections sixteen to twenty-five, inclusive, of chapter twenty-one of the laws of eighteen hundred and forty-six (1846) and acts amendatory thereof; and what is known as the "hawkers and peddlers' " law in this State, is the same as though the legislature had never undertaken to pass act number one hundred and thirty-seven (137) of the laws of 1895.

Yours truly,

FRED A. MAYNARD,
Attorney General.

Health officer—Township—Need not be a citizen or an elector.

The law does not require a person holding the office of health officer in a township, to be a citizen of the United States or an elector.

Health officers in cities and villages need not be citizens or electors, unless charter, ordinances or rules of the board of health, or some special legislation requires them to be citizens or electors.

An elector is any person who has the right to vote.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, June 28, 1895.

HON. HENRY B. BAKER, *Secretary State Board of Health, Lansing, Mich.:*

DEAR SIR—Your communication received requesting my opinion upon the following questions:

First, "Would it be legal for a person not a citizen of the United States to hold the position of health officer of a township, city or village?"

Second, "Would it be legal for a person not an elector to hold a position of health officer of a township, city or village?"

Third, "Who are electors?"

In answer to your first and second questions I will state that the right to hold a public office under our political system is not a natural right; and where it exists it is by virtue of some law expressly or impliedly creating and conferring it.

The qualifications which will entitle one to hold and exercise a public office may be set forth and declared in the constitution; and where the constitution has made no provision, the legislature may prescribe the qualifications necessary to the holding of an office. And where no limitations or qualifications are prescribed for the holding of an office by the constitution or legislature, the right to hold a public office under our political system is usually, but not always, an implied attribute of citizenship, and is presumed to be coextensive with that of voting at an election

held for the purpose of choosing an incumbent for that office. But this is not a universal rule.

The Constitution of this State does not prescribe the qualifications of a health officer of a township, city or village. The legislature of this State has, however, enacted a law—section 1634 of Howell's annotated statutes—which prescribes the qualification of a health officer of a township; and the only qualification necessary is, that the health officer shall be a well educated physician. This is not altogether necessary; for there is a provision in that section which states that "in townships where it is not practicable to secure the services of a well educated and suitable physician, the board may appoint the supervisor, or some other person, as such health officer." In a city the qualifications necessary to be a health officer may be prescribed in the charter, city ordinance, or possibly by the rules of the board of health of the city. In villages, the village council may act as the board of health of the village, or they may establish a board of health for the village and appoint officers and make rules for its government, and invest it with such powers and authority as may be necessary.

You will readily see that it is impossible for me to fully answer the question as to cities and villages, without examining the charter, ordinances and rules laid down by the board of health of each city or village separately. Or it is possible for a city to have some special legislation in regard to the board of health and its officers, by which the legislature has prescribed certain qualifications necessary to entitle one to become a health officer.

I am of the opinion that it is not necessary for a person to be a health officer to be a citizen of the United States or an elector, unless the city charter or ordinance, or rules of the board of health, or some special act of the legislature requiring a person, in order to be entitled to hold such office, to be a citizen or an elector; and this would have to be determined by examining each city or village in regard to this matter.

In townships it is not necessary for a person to be an elector or a citizen of the United States, in order to hold the position of health officer.

In answer to your third question, "Who are electors?" I will state that an elector is any person who has the right to vote, and that is determined by section 1 of article 7 of the State Constitution.

Yours truly,

FRED A. MAYNARD,

Attorney General.

Coroners—When vacancy caused by death—Vacancy shall be filled by appointment.

When one of the coronors of a county dies, the vacancy shall be filled by some suitable person appointed by the county clerk and the prosecuting attorney of the county, to perform the duties of coroner.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, June 28, 1895.

ARTHUR M. BAKER, ESQ., *County Clerk of Jackson Co., Jackson, Mich.:*

MY DEAR SIR—Mr. Franklin S. Clark, who was elected coroner of your county at the last general election, held on the 6th day of November last, died on the 15th day of June, 1895.

The question is asked what shall be done in such a case about filling the vacancy caused by the death of Mr. Clark. Some answer—as I am informed—nothing; because Mr. George Green, the other coroner of your county, is authorized by law to do the work of the late Mr. Franklin S. Clark, and in such a case there is no warrant of law for making the appointment.

You ask for my opinion. On examination I find;

First, There must be two (2) coroners elected in each organized county of this State at the general election, for the term of two years;

Sec. 604, Vol. 1, H. S.

Second, Every office shall become vacant on the death of the incumbent before the expiration of the term of such office;

Sec. 649, H. S.

Third, When, at any time there shall be in either of the offices of sheriff, coroner, register of deeds, or county surveyor, no officer duly authorized to execute the duties thereof, some suitable person may be appointed by the *county clerk* and *prosecuting attorney* of the county, to perform the duties of either of said offices for the time being;

Sec. 663, H. S.

The proper solution of the question involved in this case rests on the meaning of the words "No officer duly authorized to execute the duties thereof."

It is said Mr. George Green, the surviving coroner, is authorized to execute all the duties of the office; therefore, section 663 does not apply. This, at first, seems to be true; but, in my opinion, on examination it will appear that this is not the proper construction to be given these words.

First, We must bear in mind that there is a clear distinction between the office itself and its incumbent. The office itself is permanent, its incumbent changes from time to time. In many cases the law provides that, in the event of the death of the incumbent, some particular person shall execute the duties thereof. As, for example, in the case of the sheriff, where it provides "that whenever a vacancy shall occur in the office of sheriff of any county, the under sheriff of such county shall, in all things, execute the office of sheriff."

Sec. 582, H. S.

But, in this case, while Mr. George Green may be authorized to discharge the duties of a coroner, the law no where says that he shall succeed to the office made vacant by the death of Mr. Clark, and he shall fill his own office and that of Mr. Clark. That he shall hold two offices and continue to discharge the duties of each. If such was the case where, as in Wayne county, each coroner receives a salary for his work, then on the death of one the other would claim both salaries.

Take the case where, as in Wayne, Kent and some other counties, two or more circuit judges do the work in one circuit court, these judges are authorized to do each others work, and they divide it among themselves

as they see fit. One might do it all for a short time; but would any one contend that, where the law says there shall be two (2) judges in one circuit, on the death of one there should be no appointment to fill the vacancy thereby created, because the other was and is authorized to do his work? A man, by reason of *his own office*, may be authorized to do, in certain cases, the work of a man who does or did hold *another office*: But in law, that is a very different thing from a man being expressly named to do the particular work of the particular office made vacant, as, in this case, by death.

By law the necessity for *two coroners* is absolutely determined. There must be two coroners in each county. When for any reason there is but one, then another should be named in order to comply with the law requiring two. If the law said, on the death of one coroner, the other can do the work of both and there need be no appointment, that would be another thing. There is, however, no such law. There must be two coroners. You have now but one. In my opinion, you and Mr. Blair, your prosecuting attorney, should appoint some suitable person to perform the duties of coroner.

Yours truly,

FRED A. MAYNARD.

Attorney General.

Jurors in circuit court—No fees—Unless in actual attendance upon the court.

Clerk or judge—No right to give certificate or order to juror for pay when he is not in actual attendance on the court.

A juror in circuit court is only entitled to pay for the time that he is in actual attendance upon the court.

A juror in circuit court is not entitled to pay when excused by the court and is not in attendance upon the court.

The county clerk or judge of court has no legal right to give a certificate or order to a juror for time that he is not in actual attendance as a juror before the court.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, June 28, 1895. }

MR. FRANKLIN D. EDDY, *County Clerk, Grand Rapids, Mich.:*

MY DEAR SIR—Your communication of a recent date received requesting an opinion upon the following questions:

First, "What is the legal time for which jurors in circuit court are entitled to receive pay from county, or, in other words, if court convenes on Tuesday, is in continuous session requiring attendance of jurors until Saturday noon, and court then excuses jury until following Tuesday, a. m., are jurors entitled to pay for interim, and *every day, including Sunday?*

Second, "If a juror, by his own request, is excused by the court from attendance for one day or more, is such juror entitled to pay for such absence?"

Third, "If for any reason a juror or jury is excused by the court for a stated time, is said jury or juror entitled to receive pay for such absence?"

Fourth, "Has the county clerk (or judge of court) any legal right to decide upon question as to payment of jurors for time other than for the actual attendance of said jurors?"

In answer to the above questions I will state that section 9024 of Howell's annotated statutes reads as follows: "Each grand and petit juror, and each talesman, shall be entitled to receive two dollars for each day's attendance, and one dollar for each half day, upon any term of the circuit court, or before any court of record, on the trial of a cause, and ten cents for each mile traveled in going and returning by the the nearest traveled route, to be paid out of the county treasury of the county, on the certificate or order of the clerk or judge of such court."

The compensation of jurors is fixed by statute in the different states.

In my opinion where a statute fixes the fees of compensation, public officers should follow it strictly in allowing and paying fees.

Section 9024 is very plain, and it says that a "petit juror shall be entitled to receive two dollars for each day's attendance and one dollar for each half day upon any term of the circuit court, or before any court of record, on the trial of a cause."

I have been unable to find any decision by the courts of this State construing the section relative to jury fees; and upon examination of the decisions of the courts of other states, I have been unable to find a decision upon the question, where the state had a statute similar to ours. In *Thornburg vs. Hermann*, 1 Nevada, 473, the court decided that "jurors are entitled to compensation for the time they are in *attendance on the court*." The Nevada statute at that time provided that "jurors shall receive two dollars as fees from the party in whose favor a verdict is rendered, and that the clerk shall keep an account of all moneys received for trials by jury during the term; and if the sum so received by such juror shall not amount to three dollars per day, he shall deliver to such juror a certificate of the time for which he is still entitled to receive pay, which shall be paid out of the county treasury as other county dues." It provides further that "no fees shall be allowed jurors in criminal cases, except grand jurors and trial jurors in the district court, who may be allowed two dollars per day for each day's *actual attendance*, and twenty cents per mile from their residence to the county courthouse: *Provided, however*, That they receive nothing unless they reside more than five miles from said county courthouse."

I am of the opinion that a fair construction of the statute is, that a juror is only entitled to pay for the time that he is *in attendance upon the court*. I think this was the intention of the legislature when it enacted the law, that a juror should not be paid, except when he was *in actual attendance* upon the court; for, in the very section above mentioned, the legislature goes so far as to state that he shall receive two dollars for each day's attendance and one dollar for each half day's attendance, showing clearly the intention of the legislature *not* to compensate a juror, even for a whole day, unless he was *in attendance upon the court the whole of the day*.

There is no question in my mind but what a juror is entitled to pay for all the time that he is in attendance upon the court. He is then compelled to neglect his own private business, and even to leave his home, and to incur extra expenses in consequence thereof, and it is but a matter of simple justice that the public who requires his services, should reward him with a reasonable compensation. And if a juror is in daily attend-

ance upon a court, no matter whether he is actually engaged in the trial of a cause or not, he is entitled to compensation. But, where a juror is excused by the court, and is not required to be in daily attendance upon the court, and is not, in fact, in daily attendance upon the court, but is at liberty, to be at his home without expense, and to engage in his business and attend to his personal affairs, he is not entitled to compensation as a juror, and the clerk or judge of a court has no legal right to give a certificate for jury fees to such a juror, for him to present to the county treasurer and receive money from the public funds, which he has never legally earned.

It follows that the jury that was excused by the court for two weeks during the May term of court, and not required to be in attendance upon the court during such two weeks, is not entitled to any compensation for that two weeks. And the payment to the thirty-six jurymen of seventy-two dollars per day for twelve days, amounting to \$864.00, for which they had rendered nothing in return, would be illegal.

In my opinion, jurors in circuit courts are entitled to receive pay from the county for each day or half day *actually in attendance upon the court* and are not entitled to pay for Sunday, unless they are in attendance upon the court on that day. If the court excuses the jury from Saturday noon until Tuesday morning, the jurors are not entitled to pay for Saturday afternoon, Sunday and Monday. And when a juror is excused by the court by his own request from attendance on the court for one day or more, such juror is not entitled to pay while he is absent and not in attendance upon the court. And, furthermore, if a jury or the whole panel is excused by the court for a stated time, said juror or jury is not entitled to receive pay during such time that they are absent, and not in attendance upon the court.

The county clerk or judge of court have no legal right to give a certificate or order to a juror for time that he is not in actual attendance as a juror before the court. The law contemplates that the judge and clerk of a court are in the best position to exactly know the time of the attendance of jurors upon the court, and by reason of that fact, the legislature gave to the clerk or judge the authority to grant a certificate or order to jurors, and that they could not get their pay from the county treasury without such an order or certificate. This was done as a protection to the public moneys, and as a safeguard against the unlawful paying out of money from the treasury. And the county clerk, or judge of court, is not justified in giving orders or certificates to jurors for time that they were not in attendance upon the court.

Yours truly,

FRED A. MAYNARD,

Attorney General.

Mt. Pleasant State Normal School—Law unconstitutional—The Governor did not sign the bill within the time required by the constitution.

The bill which passed the legislature in 1895, known as an act establishing a State Normal School at Mt. Pleasant, is invalid and did not become a law, for the reason that it did not receive the approval of the Governor until four days after the adjournment of the legislature; the bill having been passed by both branches of the legislature more than five days before the final adjournment of the legislature.

The Governor, in approving bills passed by the legislature, is a component part of the legislative branch of the government, and can only act in unison with the legislature; as the executive act owes its validity to the existence of the legislative body, and upon adjournment of that body, the power of the Governor to approve bills passed by the legislature ceases, unless the constitution gives to the Governor a time for the signing and approving of bills after the adjournment of the legislature.

The constitution of this State allows the Governor to approve, sign and file in the office of Secretary of State within five days after the adjournment of the legislature, any act passed during the last five days of the session. Consequently the Governor of this State has five days after the adjournment of the legislature to examine all bills which passed the legislature during the last five days of its session, and to approve and sign them; and no bill becomes a law if approved by the Governor after the adjournment of the legislature, unless that bill was passed within the last five days of the session.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, June 29, 1895. }

HON. PERRY F. POWERS, *President Michigan State Board of Education,*
Cadillac, Mich.:

MY DEAR SIR—Yours of recent date received. You ask for my opinion relative to the constitutionality of an act passed by the last legislature, known as the act establishing a State Normal School at Mt. Pleasant.

In your letter you say that the bill passed the House May 22, 1895, and passed the Senate May 1, 1895, and that it was approved by the Governor June 3, 1895, and that the legislature adjourned *sine die* on the 31st day of May, 1895. In my opinion, assuming it to be a conceded fact that this bill was not passed by the legislature within the last five days of its session, and did not receive the approval of the Governor until four days after the adjournment of the legislature, the bill never became a law; that it is now void and of no effect. I have come to this conclusion with reluctance, but am forced to it because such a conclusion is the only one that can, I think, be legally reached. I have made a careful examination of the authorities, and will as soon as possible prepare a written opinion setting forth at length the reasons which have compelled me to reach the conclusion that the law in question is void. At this time I have only to say that the President of the United States, acting under his constitutional authority, the language of which, except as indicated below, is the same as our own State constitution so far as the clause relative to the approving and vetoing of bills is concerned (see sec. VII. of Arts. 1 & 2 U. S. Const.) has never, as I believe, attempted to sign a bill or veto one after the congress, which has passed it, had adjourned. It is a matter of common knowledge that the President goes to the capitol on the day of adjournment for the express purpose of signing bills which pass at the last moment. For that purpose the President, and likewise the Governor, is a component part of the legislative part of the government, and as was said by Chief Justice Murray in *Fowler vs. Pierce*, 2 Cal. 173, "In approving a law, the executive is not supposed to act in the capacity

of the chief magistrate of the State whose duty it is to see that the laws are properly executed, but as a part of the legislative branch of the government. This power is a unit though distributed, and the parts can only act in unison. Whenever a part ceases to act, the whole becomes inoperative. The executive act owes its vitality to the existence of the legislative body. Upon the adjournment of that body, the power ceases and all acts of a legislative nature are void. This is the practical construction which has always been given this provision of the constitution and the legislature of every State having similar constitutional provisions."

But in our own State (see Sec. 14 of Art. IV) the framers of our organic law for the express purpose of preventing the loss, and often a calamity which would result from a failure of bills to become laws by reason of their failure to receive the approval of the Governor, added these words, "The Governor may approve, sign and file in the office of the Secretary of State, within five days after the adjournment of the legislature, any act passed during the last five days of the session, and the same shall become a law. This was done because then, as now, a number of the most important bills are always passed during the last hours of the session and they knew it would be a physical impossibility for the executive to give them that careful examination which the constitution contemplates." To enable him to do so, by the words of the constitution just quoted, he has five days after the legislature has adjourned to examine all bills which passed the legislature during the last five days of its session. How could it be made clearer that this language expressly excludes bills which were passed prior to the last five days of the session? If the Governor has ten days to approve bills after they shall have been presented to him, whether the legislature had adjourned or not, then there was no sense in incorporating in the constitution the words above quoted. To me it is too clear for argument or discussion. Under our constitution, the Governor must approve each and every bill that has passed the legislature before its final adjournment, except the bills that are passed by the legislature within the last five days of its session. As this bill was not passed within the prescribed time and was approved by the Governor after the adjournment of the legislature, in my opinion, it never became a law. It is absolutely necessary in order to secure the best interests of all parties concerned, to have this question decided by the supreme court as soon as possible.

As I stated above, I will prepare later on a more formal opinion, citing at length the authorities which force me to reach the conclusion which I have.

Yours truly,

FRED A. MAYNARD,
Attorney General.

Child labor—Under 14 years of age—Manufacturer employing—Guilty of misdemeanor.

Any person who allows, suffers or permits any child under 14 years of age to work in any manner in a manufacturing establishment owned, operated or controlled by him, whether the child be hired and paid directly by him or by an agent or contractor, is guilty of a misdemeanor.

STATE OF MICHIGAN, }
ATTORNEY GENERAL'S OFFICE, }
Lansing, June 29, 1895.

HON. CHARLES H. MORSE, *Commissioner of Labor, Lansing, Mich.:*

MY DEAR SIR—Your communication received, asking for an opinion on the following question:

"Can a manufacturer, by sub-letting a portion of his work by job or contract to some other person, escape the liability of allowing children under fourteen years of age to work in his manufacturing place?"

In answer thereto will state that section 2 of act number 184 of the session laws of 1895, reads as follows:

"No child under fourteen years of age shall be employed in any manufacturing establishment within this State," etc. Section 17 of said act, among other things, states that "any person who violates or omits to comply with the provisions of this act, and who suffers * * * or permits any child to be employed in violation of its provisions, shall be deemed guilty of a misdemeanor," etc.

I am clearly of the opinion that the intent of the act is to prohibit the employing of children under fourteen years of age in manufacturing establishments in this State, and that *any person or persons* are guilty of a misdemeanor who violates the provisions of the act by allowing, suffering or permitting any child under fourteen years of age to work, or labor in any manner in a manufacturing establishment owned, operated or controlled by them; and it is their duty to see to it that no child under fourteen years of age works in and about their manufacturing establishment, whether he be hired and paid directly by them, or by an agent or contractor; for the gist of the offense is the *suffering* or *permitting* of any child under fourteen years of age to work in any manufacturing establishment. And it makes no difference in the meaning or intent of the law who hires or pays the child. It would simply make the law inoperative or easily evaded, to say to a manufacturer you cannot hire or pay children under fourteen years of age to work in your manufacturing establishment, and then allow him to let his work out to contractors by the piece, and such contractors employ the children to do the work in and about the manufacturing establishment.

The law is very plain. Any person who suffers or permits any child under fourteen years of age to be employed in his manufacturing establishment, is guilty of a violation of the law; and if he lets his work out by the piece to be done by contractors under him, it is his duty to see that the contractor does not violate the law in this respect; and if he allows and permits the contractor to employ in his manufacturing establishment children under fourteen years of age, he is guilty as prescribed by the act.

Yours truly,

FRED A. MAYNARD,
Attorney General.

SCHEDULE H.

Charged with.	No. prosecuted.	No. convicted.	No. acquitted.	No. dismissed on payment of costs.	No. nolle prossed.	No. discharged on examination.	No. of escapes, settlements, etc.
Abduction.....	2	1			1		
Adultery.....	81	18	5	4	28	18	8
Affray.....	4	2			2		
Aiding prisoners to escape.....	3	1			1	1	
Allowing vicious animals to run at large.....	5	5					
Arson.....	43	10	12		5	15	1
Assault (simple).....	44	35	3	2	1	2	1
Assault (felonious).....	3	2			1		
Assault and battery.....	2,963	1,917	456	270	174	64	83
Assault with intent to do great bodily harm, etc.....	157	56	18	8	27	45	3
Assault with intent to murder.....	55	20	7	1	10	10	7
Assault with intent to commit larceny.....	8	2	1				
Assault with intent to commit robbery.....	7	3	3			1	
Assault with intent to disfigure.....	1	1					
Assault with intent to commit rape.....	30	13	4	1	3	7	2
Attempt to commit rape.....	5	3			2		
Attempt to commit burglary.....	8	6		1	1		
Attempt to break jail.....	1	1					
Attempt to commit larceny.....	1	1					
Attending prize fight.....	8	6					2
Bastardy.....	193	27	3	23	24	18	41
Bigamy.....	18	5	1	1	4	2	
Blasphemy.....	1	1					
Breach of the peace.....	169	140	24	2	1	2	
Breaking jail.....	3	2				1	
Breaking and entering dwelling in night time.....	5	2				3	
Breaking and entering dwelling in day time.....	24	7	3		5	9	
Breaking and entering dwelling.....	3	1				2	
Breaking and entering store in night time.....	5	1	1	1		2	
Breaking and entering schoolhouse, etc.....	2	2					
Breaking and entering railroad car with intent, etc.....	62	51	5		4	2	
Breaking and entering office in day time.....	1	1					
Breaking and entering saloon in night time.....	2	2					
Breaking street lamp.....	1				1		
Bringing stolen goods into this country.....	7	1			6		
Bribery.....	3	2	1				
Burglary.....	356	224	35	2	43	44	8
Careless use of firearms.....	15	6	2	5		1	1
Carnal knowledge of girl under 16 years of age.....	5	3	1			1	
Carrying burglar's tools.....	2		2				
Carrying concealed weapons.....	130	99	17	3	6	2	8
Criminal trespass.....	8	2		1			
Contempt of court.....	10	10					
Conspiracy.....	7				2	5	
Counterfeiting.....	2	2					

SCHEDULE H.—CONTINUED.

(Charged with.)	No. prosecuted.	No. convicted.	No. acquitted.	No. dismissed on payment of costs.	No. nolle prossed.	No. discharged on examination.	No. of escapes, settlements, etc.
Compounding a felony.....	1	—	—	—	1	—	—
Cruelty to animals.....	116	73	22	5	10	3	3
Cruelty to children.....	7	7	—	—	—	—	—
Detaining girl in house of ill fame.....	1	1	—	—	—	—	—
Defrauding hotel keeper.....	88	48	8	9	8	1	14
Disorderly, classified as follows:							
(a) Common prostitutes.....	181	154	4	8	5	5	6
(b) On passenger train, disorderly.....	2	2	—	—	—	—	—
(c) Drunks.....	2,405	2,313	84	19	15	14	11
(d) Drunk and disorderly.....	592	562	9	12	2	1	6
(e) Drunkards and tipplers.....	215	201	4	—	—	5	5
(f) Driving fast over county bridge.....	16	15	—	—	1	—	—
(g) Gamblers and keeping of gaming rooms.....	21	19	1	—	1	—	—
(h) Inmate house of ill fame.....	8	8	—	—	—	—	—
(i) Keepers of bawdy houses.....	52	32	4	2	6	2	6
(j) Non support of family.....	204	83	40	88	14	19	10
(k) Letting house for purposes of prostitution.....	2	1	—	—	—	1	—
(l) Using profane language.....	2	2	—	—	—	—	—
(m) Using obscene language on train.....	1	1	—	—	—	—	—
(n) Obstructing justice.....	3	3	—	—	—	—	—
(o) Unclassified.....	5,966	5,766	129	42	20	2	7
(p) Vagrants.....	1,410	1,341	22	—	35	11	1
Distributing obscene literature.....	3	—	1	—	—	—	—
Disturbing public meeting.....	4	2	—	2	—	2	—
Disturbing public school.....	3	1	—	—	1	—	1
Disturbing public peace.....	25	23	—	1	—	1	—
Disturbing religious meeting.....	76	55	7	9	—	1	4
Disbarment.....	2	2	—	—	—	—	—
Disobeying subpoena.....	1	1	—	—	—	—	—
Disposing of glandered horses.....	2	2	—	—	—	—	—
Disfiguring horse.....	1	1	—	—	—	—	—
Disturbing mechanic in his lawful occupation.....	7	3	1	—	8	—	—
Drunk in public places.....	474	461	13	—	—	—	—
Embezzlement.....	99	23	19	16	14	25	2
Entering freight car to obtain passage.....	89	38	—	—	—	1	—
Entering freight car to obtain carriage.....	1	1	—	—	—	—	—
Entering office in day time without breaking.....	1	1	—	—	—	—	—
Employing children under 14 years of age.....	1	1	—	—	—	—	—
Exposing poisonous substances.....	2	—	1	—	—	1	—
Enticing female away and assaulting her.....	5	2	1	—	2	—	—
Extortion.....	2	—	—	—	2	—	—
False pretenses, property or money, obtaining.....	101	23	4	7	27	34	6
False personation.....	1	1	—	—	—	—	—
Fraudulent disposition of chattel mortgaged property.....	45	15	7	5	3	10	5
Fraudulently concealing chattel mortgaged property.....	3	1	—	—	—	1	1
Fraudulent disposition of property held under contract.....	7	3	—	1	1	1	1
Frequenting houses of ill fame.....	14	14	—	—	—	—	—
Forgery.....	45	22	4	4	4	10	1
Furnishing liquor to prisoners.....	1	1	—	—	—	—	—
Gambling.....	55	42	3	3	4	4	—
Gross lewdness.....	2	—	—	—	—	2	—
Having in possession lottery tickets.....	3	3	—	—	—	—	—
Highway robbery.....	4	3	—	—	1	—	—
Hunting on enclosed premises.....	6	5	—	—	—	1	—
Illegal issuing of township orders.....	1	—	—	—	1	—	—
Impounding want of chastity to a female.....	2	1	—	—	—	1	—
Incest.....	5	2	2	—	1	—	—
Indecent exposure of person.....	32	15	4	—	3	5	5
Indecency, unclassified.....	8	4	2	1	1	—	—
Indecent language.....	1	1	—	—	—	—	—
Indecent liberties with male child.....	2	1	1	—	—	—	—

SCHEDULE H.—CONTINUED.

Charged with.	No. prosecuted.	No. convicted.	No. acquitted.	No. dismissed on payment of costs.	No. nolle prossed.	No. discharged on examination.	No. of escapes, settlements etc.
Indecent liberties with female child.....	15	6	1		2	6	
Juvenile disorderly.....	110	84	19	5		2	
Jumping on moving train.....	112	106	3		3		
Keeping house of ill fame.....	37	29				1	5
Keeping barber shop open on Sunday.....	30	9	12	8	1		
Kidnaping.....	1	1					
Larceny, classified as follows:							
(a) From building.....	4	3	1				
(b) From dwelling house in daytime.....	61	41	5	1	3	11	
(c) From office in day time.....	1	1					
(d) From dwelling.....	4	3	1				
(e) From the person.....	78	37	6	4	7	23	1
(f) From store in day time.....	30	22		2	2	4	
(g) Of horse.....	16	7	1		1	6	1
Larceny, unclassified as follows:							
(a) By conversion.....	13	3	1	5		4	
(b) Of less than \$25.00.....	850	632	131	37	32	16	2
(c) Of more than \$25.00.....	176	106	17	4	17	32	
(d) Of timber.....	9	4	1	1	3		
(e) Unclassified.....	1,881	1,263	217	98	153	94	37
Lewd and lascivious cohabitation.....	16	7			2	7	
Libel.....	6		2		3		1
Maintaining lottery.....	2	1	1				
Maintaining nuisance.....	2		1			1	1
Maintaining gaming room.....	5				2	2	1
Malicious killing of animals.....	3					2	1
Malicious destruction to dwelling.....	30	24	2	1		3	
Malicious mischief.....	11	4	6		1		
Malicious threats.....	36	43	22	15	4	1	1
Malicious destruction of property.....	201	95	37	17	17	33	2
Malicious destruction to building.....	20	7	2	2	5	3	1
Malicious injury to toll gate.....	1		1				1
Maiming horse.....	1						
Manslaughter.....	11	4	3			4	
Mahem.....	4	2				2	
Malicious injury to real property.....	26	8	9	6	3		
Misappropriation of public funds.....	1		1				
Misdemeanor.....	6	5	1				
Murder.....	35	9	13		8	4	1
Neglecting to bury dead animal.....	2	1	1				
Neglecting to advertise found goods.....	2	2					
Obstructing drain.....	4		2		2		
Obstructing railroad track.....	8	5		2			1
Passing counterfeit money.....	1					1	
Poisoning animals.....	2	1			1		
Peddling without license.....	9	6			2		1
Perjury.....	27	12	3		6	6	
Personating an officer.....	5	2	1	1			
Printing obscene literature.....	5		3		2	1	
Posting obscene literature.....	1		1				
Profanity.....	4	3					1
Polygamy.....	1	1					
Purchasing goods of minor.....	2	1			1		
Rape.....	63	21	7	6	8	17	4
Receiving stolen property.....	33	36	14	1	10	22	
Resisting an officer.....	23	5	5		8	5	
Refusing to answer census enumerator.....	1			1			
Reproducing obscene and lascivious music on phonograph.....	1	1					
Hiding away with another's livery.....	1	1					
Rioting.....	8					8	

SCHEDULE H.—CONCLUDED.

Charged with.	No. prosecuted.	No. convicted.	No. acquitted.	No. dismissed on payment of costs.	No. nolle prossed.	No. discharged on examination.	No. of escapes, settlements, etc.
Robbery	42	16	2	2	10	12	4
Search warrant	41	29	4	2	1	1	1
Seduction	21	7	5	2	2	2	3
Selling diseased meat	2	1	1	1			1
Setting set-gun	2	2	2				
Slander	217	100	62	21	18	5	11
Sodomy	12	6	2		3	1	
Stealing ride on railroad train	22	22					
Swearing to keep the peace	35	18	7	3	1	5	1
Swearing	1	1		1			
Trespass	13	4	1	5	3		
Throwing stone at cars	10	10					
Truancy	126	98	3		12	12	1
Unhitching horse and driving away without consent of owner	6	5	1				
Unlawful practice of dentistry	1	1	1				
Unlawful practice of medicine	7	3	2	1	1		
Unlawful printing of public record	1	1					
Uttering forged instrument	19	4	2			3	
Unlawfully entering fair grounds	3	3					
Violation of election law	4	1	1		1		1
Violation of educational law	2		1		1		
Violation of factory law relative to fire escapes	1		1				
Violation of game and fish law, classified as follows:							
(a) Hounding deer	10		3		7		
(b) Killing deer out of season	13	8	3	2			
(c) Killing ducks	1	1					
(d) Killing partridge out of season	1	1					
(e) Shipping deer out of State	13	13					
(f) Catching trout out of season	1		1				
(g) Catching fish with seines	16	11	1		4		
(h) Catching fish with nets with too small meshes	1			1			
(i) Shipping trout out of season	1			1			
(j) Taking trout under 6 inches long	2	2					
(k) Killing muskrat	6	6					
(l) Unclassified	177	137	7	7	18	8	
Violation of city ordinance	5					5	
Violation of quarantine law	1			1			
Violation of insurance law	2	2					
Violation of village law	10	10					
Violation of railroad law	11	9				1	1
Violation of tax law	2	2					
Violation of tobacco law	6	5	1				
Violation of liquor law, classified as follows:							
(a) Bar obstructions	76	4	2	5	19	46	
(b) Keeping open on holiday	25	14	1		2	8	
(c) Keeping open on election day	4	4					
(d) Keeping open on Sunday	204	84	18	9	33	60	
(e) Keeping open after hours	70	25	8	2	14	21	
(f) Selling to intoxicated person	7					7	
(g) Selling to minors	27	7	6		5	8	1
(h) Selling without payment of tax	333	116	14	114	43	44	2
(i) Unclassified	434	284	34	20	39	55	2
(j) Unlawful sales by druggists	1				1		
Violation local option law	61	51	3	1	4	1	1
Violation oil inspection law	1	1					
Violation pharmacy law	26	19	1	1	5		
Violation Sunday laws	6	3	2		1		
Willful trespass	81	45	10	4	13	9	
Grand total	23,106	17,957	1,712	925	1,110	1,056	346

SCHEDULE 1.

County.	Prosecuting Attorney.	Postoffice.	No. prosecuted.	No. convicted.	No. acquitted.	No. dismissed on payment of costs.	No. nolle prossed.	No. discharged on examination.	No. settled or otherwise compromised.
Alcona.....	Oemond H. Smith.....	Harrisville.....	15	11	1	---	2	---	1
Alger.....	Henry B. Freeman.....	Au Train.....	18	14	2	---	---	2	---
Allegan.....	Fidus E. Fish.....	Allegan.....	145	108	7	8	15	4	8
Alpena.....	Alex. M. Marshall.....	Alpena.....	106	44	12	16	4	21	9
Antrim.....	Andrew B. Dougherty.....	Bellaire.....	26	14	7	---	2	3	---
Arenac.....	Sanford E. Hayes.....	Standish.....	45	28	9	1	2	8	2
Baraga.....	Wm. K. Haviland.....	L'Anse.....	23	9	2	3	3	3	3
Barry.....	James A. Sweezey.....	Hastings.....	101	56	9	6	16	8	6
Bay.....	Isaac A. Gilbert.....	Bay City.....	537	359	97	84	24	20	3
Benzie.....	Dwight G. F. Warner.....	Benzonia.....	18	13	2	1	---	2	---
Berrien.....	N. A. Hamilton.....	St. Joseph.....	315	238	13	7	44	12	3
Branch.....	Wm. H. Compton.....	Coldwater.....	66	46	11	4	4	1	---
Calhoun.....	O. Scott Clark.....	Marshall.....	366	287	12	5	32	22	25
Case.....	Charles E. Sweet.....	Dowagiac.....	344	303	5	12	5	17	2
Charlevoix.....	Frederick W. Mayne.....	Boyne.....	83	28	1	1	---	1	---
Cheboygan.....	Victor D. Sprague.....	Cheboygan.....	59	46	6	---	5	2	---
Chippewa.....	Horace M. Oren.....	Sault Ste. Marie.....	125	87	12	3	20	6	17
Clare.....	John Quinn.....	Harrison.....	34	19	1	1	8	5	---
Clinton.....	Wm. A. Norton.....	St. Johns.....	91	74	6	6	1	1	3
Crawford.....	Oscar Palmer.....	Grayling.....	87	26	5	---	5	1	---
Delta.....	Ira C. Jennings.....	Escanada.....	63	43	6	3	9	1	1
Dickinson.....	F. J. Trudell.....	Iron Mountain.....	212	153	50	5	1	3	---
Eaton.....	Horace S. Maynard.....	Charlotte.....	661	574	10	5	59	12	1
Emmet.....	Clay E. Call.....	Harbor Springs.....	39	20	7	3	1	6	2
Genesee.....	George A. Brown.....	Flint.....	189	153	3	5	5	23	---
Gladwin.....	Guy E. Smith.....	Gladwin.....	27	13	9	3	---	1	1
Gogebic.....	Charles E. Miller.....	Bessemer.....	433	391	55	19	11	7	---
Grand Traverse.....	Wm. H. Foster.....	Traverse City.....	145	84	8	19	7	10	17
Gratiot.....	Wm. A. Leet.....	Ithaca.....	55	52	3	---	---	---	---
Hillsdale.....	Guy M. Chester.....	Hillsdale.....	115	91	8	2	5	1	8
Houghton.....	Albert T. Stroeter.....	Houghton.....	347	270	22	21	9	11	14
Huron.....	Hiram L. Chipman.....	Bad Axe.....	41	29	7	1	2	1	1
Ingham.....	Leonard B. Gardner.....	Mason.....	973	766	40	7	1	75	84
Ionia.....	Royal A. Hawley.....	Ionia.....	433	399	8	6	18	2	---
Iosco.....	Albert E. Sharpe.....	Tawas City.....	62	36	18	---	3	5	---
Iron.....	M. H. Moriarity.....	Crystal Falls.....	58	20	19	2	3	12	2
Isabella.....	Elijah D. Wheaton.....	Mt. Pleasant.....	68	36	13	7	---	4	8
Jackson.....	Geo. H. Blair.....	Jackson.....	597	456	19	56	86	23	7
Kalamazoo.....	Albert S. Frost.....	Kalamazoo.....	439	377	5	5	42	6	4
Kalkaska.....	Joshua L. Boyd.....	Kalkaska.....	34	24	2	2	2	1	3
Kent.....	Alfred Wolcott.....	Grand Rapids.....	1,715	1,469	133	7	46	46	14
Keweenaw.....	Willard E. Gray.....	Eagle River.....	3	3	---	---	---	---	8
Lake.....	Chas. D. Barghoorn.....	Baldwin.....	45	38	2	---	7	---	---
Lapeer.....	Wm. E. Brown.....	Lapeer.....	230	211	6	1	7	4	1
Leelanau.....	Clinton L. Dayton.....	Leland.....	32	11	9	5	6	---	1
Lenawee.....	John E. Bird.....	Adrian.....	449	392	16	2	20	6	13
Livingston.....	John Cmmiskey.....	Howell.....	65	42	7	2	2	10	2
Luce.....	Sanford N. Dutcher.....	Newberry.....	20	11	1	---	2	4	2
Mackinac.....	Henry Hoffman.....	St. Ignace.....	55	36	11	2	5	1	---
Macomb.....	John A. Weeks.....	Mt. Clemens.....	214	188	9	3	15	4	15

SCHEDULE I.—CONCLUDED.

County.	Prosecuting Attorney.	Postoffice.	No. prosecuted.	No. convicted.	No. acquitted.	No. dismissed on payment of costs.	No. nolle prossed.	No. discharged on examination.	No. settled or otherwise compromised.
Manistee.....	Frank E. Withey.....	Manistee.....	444	359	20	32	20	11	2
Marquette.....	H. Olin Young.....	Marquette.....	235	186	9	2	8	31	2
Mason.....	Humphrey S. Gray.....	Ludington.....	84	85	3	4	5	6	1
Mecosta.....	Albert B. Cogger.....	Big Rapids.....	113	74	17		18	3	1
Menominee.....	William H. Phillips.....	Menominee.....	279	231	7	5	23	5	8
Midland.....	Edmund P. Rice.....	Midland.....	59	20	4	22	12	1	
Missaukee.....	Alvah G. Smith.....	Lake City.....	27	15	2	5		4	7
Monroe.....	Harry A. Lockwood.....	Monroe.....	105	74	8	7	5	1	1
Montcalm.....	Bert Hayes.....	Stanton.....	87	58	14		13	3	
Montmorency.....	Fred J. Northway.....	Atlanta.....	22	13	3		3		
Muskegon.....	R. J. Macdonald.....	Muskegon.....	349	259	26	19	28	8	9
Newaygo.....	W. D. Leonardson.....	Newaygo.....	42	17	10	2	12	1	
Oakland.....	Frederick Wieland.....	Pontiac.....	238	175	10	7	31	15	
Oceana.....	Louis M. Hartwick.....	Hart.....	63	47	6	2	7		1
Ogemaw.....	William A. Weeks.....	West Branch.....	47	37	5		4	1	
Ontonagon.....	William R. Adams.....	Ontonagon.....	14	9	1	1		1	2
Oscoda.....	Charles H. Rose.....	Hersey.....	72	50	5	6	10	1	
Oscoda.....	John A. McMahon.....	Mio.....	16	7	7		1	1	
Otsego.....	Willis L. Townsend.....	Gaylord.....	30	22			1	2	5
Ottawa.....	Arend Visscher.....	Grand Haven.....	258	224	4	8	9	5	8
Presque Isle.....	Griffin Covy, Jr.....	Rogers City.....	28	12	6	6	2		2
Roscommon.....	Henry H. Woodruff.....	Roscommon.....	37	33	8		1		
Saginaw.....	R. L. Crane.....	Saginaw.....	857	508	56	85	153	54	1
Sanilac.....	William A. Mills.....	Sanilac Center.....	34	17	3	1	10	3	
Schoolcraft.....	Carey W. Danton.....	Manistique.....	56	46	3		2	5	
Shiawassee.....	Frank H. Watson.....	Owosso.....	165	118	15	3	9	12	8
St. Clair.....	Lincoln Avery.....	Port Huron.....	561	428	4	18	29	30	2
St. Joseph.....	Bishop E. Andrews.....	Centreville.....	121	77	19	5	7	12	1
Tuscola.....	Theron W. Atwood.....	Caro.....	58	54		2		2	
Van Buren.....	Lincoln H. Titns.....	Paw Paw.....	108	82	14	9	1		2
Washtenaw.....	Seth C. Randall.....	Ann Arbor.....	370	294	4	37	19	12	4
Wayne.....	Allan H. Frazer.....	Detroit.....	7,682	6,155	689	343	195	360	
Wexford.....	David A. Rice.....	Cadillac.....	74	59	9	2	2	2	
Total.....			28,106	17,957	1,712	925	1,110	1,056	345

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